TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~264~~ 37

HENRY COUNTY, PLAINTIFF IN ERROR,

vs.

ALBERT H. NICOLAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JANUARY 11, 1875.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1874, thereof, between Albert H. Nicolay, plaintiff, and Henry County, in the State of Missouri, defendant, a manifest error hath happened, to the great damage of the said Henry County, in the State of Missouri, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the the same at Washington City, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE
Clerk C. C. U. S., Missouri Districts,
By C. M. WARD, *Deputy.*

Allowed by—

JOHN F. DILLON, *Judge.*

2 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States a full, true, and complete transcript of the record and proceedings in the within cause as fully as the same remain of record and on file in my office.

In witness whereof I have hereto signed my name, and affixed the seal of said circuit court, at office in the city of Jefferson, this 22d day of May, A. D. 1874.

[SEAL.]

M. M. PRICE, *Clerk,*
By C. M. WARD, *Deputy.*

(Indorsed:) United States circuit court, districts of Missouri. Albert H. Nicolay vs. Henry County, Missouri. Writ of error to the circuit court of the United States for the western district of Missouri. Returned and filed. 187 . , clerk.

3 Supreme Court of the United States, October term, A. D. 1874.

ALBERT H. NICOLAY, PLAINTIFF,
vs.
HENRY COUNTY, IN THE STATE OF MISSOURI, defendant.

Afterwards, to wit, on the first Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Henry County, in the State of Missouri, by Philips & Vest, its attornies, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The circuit court of the United States for the western district of Missouri erred in sustaining the demurrer to defendant's evidence filed in said circuit court by plaintiff.

The circuit court of the United States for the western district
4 of Missouri erred in excluding from the consideration of the jury the evidence introduced and offered by defendant, and in directing the jury to find a verdict for plaintiff, said Albert H. Nicolay.

The circuit court of the United States for the western district of Missouri erred in overruling the motion for a new trial, filed by defendant in said circuit court.

The circuit court of the United States for the western district of Missouri erred in rendering judgment for plaintiff and against defendant, and said judgment so rendered by said circuit court is contrary to law, and for the wrong party.

The circuit court of the United States for the western district of Missouri erred in overruling the motion filed by defendant in said circuit court to arrest its judgment therein for plaintiff.

5 And the said Henry County, in the State of Missouri, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that it may be restored to all things which it hath lost by occasion of the said judgment.

Henry County, in the State of Missouri.

By PHILIPS & VEST,
Its Attornies.

(Indorsed:) Albert H. Nicolay vs. Henry County. Assignment of errors. Filed April 25, 1874. M. M. Price, clerk. By C. M. Ward, D. C.

6 The United States of America to Albert H. Nicolay, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States for the districts of Missouri, to be holden at Washington City, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein Henry County, in the State of Missouri, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behaf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the western district of Missouri, this 25th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN F. DILLON,
Judge United States Circuit Court Western District of Missouri.

Service of this citation accepted 25' April, 1876.

JAS. GRANT,
For Deft. in Error.

(Indorsed:) United States circuit court, western district of Missouri. Albert H. Nicolay vs. Henry County, Missouri. Citation. Filed 187 . , clerk.

7 Opinion of the Hon. F. P. Wright, of Sedalia, Mo., ex-judge of the *seventh judicial district of the State of* [Supreme Court of the United States for] Missouri, pronouncing the issue of bonds of Henry and St. Clair Counties, Mo., in aid of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company, as legal and regular in every particular, all points of law having been fully complied with, therefore being strictly valid.

CLINTON, MO., *February* 10, 1871.

ALBERT H. NICOLAY, ESQ.,
43 *Pine street, New York:*

SIR: In reply to your inquiries whether the bonds issued by the counties of Henry and St. Clair, of this State, in aid of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company have been issued pursuant to law, I would state that, in my opinion, they have been so issued, and are valid.

The Tebo and Neosho Railroad Company was incorporated in 1860, embodying as a part of its provisions sections 8 to 22, inclusive, of the act incorporating the Osage Valley and Southern Kansas Railroad Company, approved November 21, 1857, which acts, I presume, are before you for inspection.

The 14th section of the latter act makes it lawful for any county court, of any county in which any part of the route said railroad or branches may be, or any county adjacent thereto, to subscribe to the stock of the company, * * * and for the stock subscribed on behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and take proper steps to protect the interest and credit of the county. At that time there were no constitutional conditions or restraint upon the legislature in granting the powers thus conferred. The 6th section of the charter provides that the company may extend branch railroads into and through any counties the directors may deem advisable; and the subsequent act, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, 1868, more specifically defines, but in nowise restrains, the foregoing rights and powers of the company in regard to such branch roads. It merely points out more minutely its mode of action in locating, constructing, and maintaining such branch roads as the company may desire. I find the company, pursuant to the act, has, by resolutions entered upon its records, expressed its desire to build such branch railroad, designating the name, its point of intersection with the main line, and general course, as required, and that a certified copy was duly filed with the secretary of state.

The 4th section of the charter authorizes the directors to "appoint committees," with powers, of course, not inconsistent with the charter; and in compliance with the 2nd section of the act of 1868, "in aid of building such branch roads," the board of directors appointed a committee to solicit donations and subscriptions to the capital stock of such branch road, empowering the committee to survey, mark, locate, and

construct said branch, and to make engagements and contracts therefor.

The county courts of this State, under the direction of law, have the control of the financial and municipal affairs of the county; hence, as provided by the charter, whenever subscriptions are made on behalf of counties, they are made by the county courts; and whenever that body can legally subscribe stock to the main line, and issue bonds in payment therefor, they have the same authority to do so in regard to the branches.

Upon a careful examination, I think the county courts of both Henry and St. Clair Counties, in making their subscriptions, have done so in compliance with law and the directions of the charter of the road, as enacted, and unless a different rule of action has been prescribed by subsequent organic or statutory law, which these county courts were bound to pursue and have not pursued, in making the subscriptions and issuing the bonds, then, of course, the bonds are valid.

The only possible pretense that these county courts have not acted within the line of their prescribed duties arises from the fact that by the 14th section of the 11th article of our new constitution, adopted in 1865, more than five years after the grant of the charter to the road, it is provided that the general assembly shall not authorize any county to become a stockholder or loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, at a regular or special election to be held therein, shall assent thereto. And, also, by the 17th section of the second article, respecting railroad companies, of our general statutes, adopted in 1866, it is provided that it shall be lawful for the county court of any county so take stock for such, or to loan the credit thereof to any duly-organized railroad company, provided that two-thirds of the qualified voters, at a general or special election to be held therein, shall assent to such subscription.

This proviso is added in compliance with the above provision in the new constitution. It is only designed to apply to subsequently-granted charters, or to such as had not previously given such courts power to subscribe at discretion without such election.

Neither the said provision in our new constitution, nor said 17th section, have any bearing upon the charter previously granted to this road. They were not designed to have any effect, nor could they have if so designed.

The charter is a contract made between the State and the corporation. It is a franchise granted by the State; the State the grantor, and the corporation or corporators the grantees; a valid contract; and the Federal Constitution provides that no State shall make any law impairing the obligations of contracts. Of course, no State can violate this provision of the Federal Constitution any more by organic or constitutional action than by legislative action, and it cannot be done by either.

Before the Tebo and Neosho Railroad Company accepted any county subscriptions to the main line, they were desirous to know whether county courts of counties through which the road was located could legally make the subscriptions without the previous assent of the people through an election, as provided by the new constitution and said 17th section of the act of 1865, above referred to. I was applied to by the president of the company for my legal opinion, which I gave, and herewith send you a copy. County courts of counties along the line of the road soon afterwards made large county subscriptions, the validity of which have not been doubted, although no previous election was held.

I have access to the books of the company, and I find that in all their proceedings they have been exceedingly careful to comply with the law,

and that the conditions of the subscriptions were complied with before the bonds were issued, and the bonds properly issued.

Respectfully yours, &c.,

F. P. WRIGHT.

(On margin in pencil:) Attached by order of court. See page 95.
(Indorsed:) Exhibit A.

8 EXHIBIT B.

Opinion of Judge F. P. Wright on the privileges and duties of county courts relative to the Tebo and Neosho Railroad Company.

9 JUDGE WRIGHT'S OPINION.

SEDALIA, MO., *July 6th*, 1867.

ASA C. MARVIN,
President of the Tebo and Neosho Railroad Company.

SIR: In compliance with your request, I here give you my legal opinion concerning the rights and powers of certain county courts to subscribe stock, on the part of their respective counties, in the Tebo and Neosho Railroad Company, and whether they can legally do so without first having the assent of the people through an election held for that purpose.

The act incorporating the Tebo and Neosho Railroad Company, approved January 16th, 1860, re-enacts and makes a part of your charter, among others the 14th section of the charter of the Osage and Southern Kansas Railroad Company, approved November 21st, 1857. This 14th section, among other things, provides that "it shall be lawful for the county court of any county in which any part of the route of said railroad, or its branches, may be, or any county adjacent thereto, to subscribe to the stock of the company, or invest its three-per-cent. fund, or other internal-improvement fund belonging to the county, as stock in said road, and for stock subscribed in behalf of the county may issue bonds," &c.

I take it for granted that all will assent to the proposition that full power is vested in the legislature to authorize such county courts to subscribe stock to railroads in behalf of their respective counties. I am sure no well-informed person will question this power. The 14th section, as it stands by itself, gives to such county courts the discretionary power to thus subscribe to stock in your railroad company,
10 and hence it is important to inquire whether by any other statute any addition or restraint is placed on the discretion thus conferred on those county courts. In the construction of statutes, the purpose is to ascertain the intention of the legislature, and when discovered that intention must prevail, provided it is sanctioned by constitutional authority. Our general statutes provide (page 84) that words and phrases shall be taken in their plain or ordinary and usual sense; but in order to a full elucidation of all the rights, powers, and duties conferred by your charter, it is useful and essential to examine all acts and laws in pari materia and in any manner affecting the same. When your charter was granted, the 57th section of the act to authorize the formation of railroad associations and regulate the same was in force. (R. C., 1855, p. 438.) That section provides that all existing railroad incorporations, and such as may be hereafter chartered, shall respectively

have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charters. This section made such provisions of that general statute for the formation of railroad associations applicable to your charter as were not inconsistent with or calculated to vary its terms, but not otherwise. The object of the general statute is to encourage the construction of railroads in this State. Charters to individual companies were being continually granted. It might be in some there would be found a deficiency of powers for successful operations, and hence such companies might look to that general statute to supply the deficiency, but it was not designed to lessen the powers granted in the charters, nor was it intended to prescribe rules of action to govern any *further* legislature in granting charters to
11 individual companies. One legislature cannot bind a future legislature. Each possess equal powers, and the one which granted your charter could have repealed the entire general act, if it had seen proper to do so. It is an old rule, never denied and always applied, that statutes against the power of subsequent legislatures are not binding. Now, it is true that the 30th section of this general act authorizing private persons to form associations for the purpose of constructing railroads, after authorizing county courts to subscribe to stock in behalf of their counties, declares that such county courts subscribing or proposing to subscribe, may, for information, cause an election, &c., and in a subsequent act the word "may" is to be read "shall," but this provision was evidently designed for the benefit and action of such county courts as might subscribe stock in behalf of their counties in railroad companies whose charters do not confer on them the authority to do so, and not in cases where the charters confer the power. Hence it is not material to inquire whether that provision is merely directory or not; though I regard it as merely directory, and that subscriptions made in those self-organized associations, without a previous election, would not be illegal on that account.

The charter of the Tebo & Neosho Railroad Company is a special grant to the company. It authorizes certain county courts to subscribe to its stock without any conditions. The power to do so is conferred and left in their discretion whether they will exercise it or not. The power thus conferred is a right vested as well in the company as in the counties. The company, it is true, cannot compel the county courts to exercise this power and subscribe stock any more than they could
12 compel an individual person to do so provided they should refuse, nor unless, in the apparent abuse of this power, can they be restrained from exercising it. The Tebo & Neosho Railroad Company, if they had so chosen, might have organized under that general law, and been governed solely by its provisions in constructing their road, but they chose to obtain a special charter, with special provisions, and the legislature have granted it. In doing so the legislature have conferred on the county courts the power to subscribe stock without any previous election or other contingency, and it must be conceded the legislature had the right to do so. The authority being thus contained in the charter, it is to be presumed the legislature intended that county courts, in subscribing or not subscribing stock, should be governed by the provisions as contained in the charter. I am, therefore, of opinion that at the time your charter was granted there was no law in force applicable to its provisions require an election to be held "for information" before such county courts were authorized to subscribe to the stock of your company in behalf of their counties. But you here asked

me to state what effect, if any, the 17th section of the general statutes of 1865, respecting railroad associations, will have upon the power of county courts to subscribe stock as contemplated by your charter. This 17th section authorizes county courts to take stock for the county in any duly-organized railroad company under that or any other law of the State, provided two-thirds of the qualified voters of such county, at a regular or special election to be held therein, shall assent to such subscription. This provision requiring a two-thirds vote of the voters of the county is an amendment of the 30th section of that act as it stood under the revision of 1855, and two questions are here pre-
13 sented and become important: 1st. Did the legislature intend by this amendment in the general statutes to prohibit county courts from subscribing stock to railroad companies on the part of their counties wherein they had been authorized to do so by charters previously granted unless they should first have the assent of two-thirds of the qualified voters of the county by an election? And, secondly, if so intended, have not your company constitutional guarantees that such amendment shall not be applied to your charter without the assent of your company? As to the first question, my opinion is that the legislature never intended that provision should be so applied. It was designed as a rule for such county courts as had not otherwise been authorized to subscribe stock. The 57th section of the railroad incorporation act of 1855 is embraced in the 48' sec. of the same act of 1865, and continues to subject railroad companies to only such liabilities of that act as are not inconsistent with their charters. Surely, if such county courts were empowered under the provisions of your charter to subscribe for stock in behalf of their counties without any previous election, it unquestionably would be inconsistent therewith to prohibit such subscription unless two-thirds of the qualified voters of the county, by an election vote, should first assent to such subscription, and hence the special provisions in the charter must govern.—(See North Mo. R. R. Company vs. Gott, 25 Mo. Report, 540.)

Believing, as I do, that the legislature never intended that a two-thirds vote, or any such vote, should be taken as a condition-precedent to such subscription, I do not regard it as really necessary to discuss the second question—as to the power of amendment without the assent of the company; but as it may be desirable to bring in review
14 the subject in all its bearings, I will make a few suggestions as regards the power of the legislature to make material amendments not assented to by corporators.

There was no power reserved to the legislature by the provision of your charter to make such amendments, nor in the general statutes, at the time the provision was engrafted in the 17th section. It is true that under the head of corporations, in the revisions of 1845 and 1855, (sec. 7,) it was provided that charters of corporations thereafter granted by the legislature might be amended in the discretion of the legislature; but that provision is not retained in the revision of 1865, and in its stead it is provided that no charter of any corporation granted by the legislature of this State shall be altered, suspended, or repealed by such legislature unless proof be satisfactory to the legislature that notice has been given to the president and secretary of the incorporation at least one month before such alteration. No such thing as this was done; but the reserved power of amendment contained in the general law, if any existed, having been repealed, the constitutional protection of vested rights steps in and forbids any amendment without the consent of the company. Whatever rights are conferred on your company by its char-

ter "are protected by the principles of every free government and by our State and Federal Constitutions in particular." (See City of St. Louis vs. Russell, 9 Mo., 512.) In the case of The Pacific Railroad vs. Renshaw, (18 Mo. R., 214,) our supreme court say: "When an act of incorporation has been passed, the legislature cannot change any of its terms without the consent of the company unless the power to make such change is reserved in the act of the incorporation itself, or as contained in a general law authorizing such alterations in all charters not expressly exempt from the operations of said general act." The reserved power of amendment at discretion (if any exists) was repealed by the revising legislature which enacted the above provision in the 17th section, as before stated. It is a sufficient reason why the law is as above quoted from the decision of our supreme court to state that article 1, section 10, of the Constitution of the United States declares that no State shall make any law impairing the obligations of contracts. The Supreme Court of the United States, in the Dartmouth College case, (and I refer to this case in particular because it is so generally known,) decided that an act of the legislatur · altering the charter without the consent of the corporation in a material respect is an act impairing the obligations of the charter, and is unconstitutional and void. (See 4th Wheaton, 518) The charter of that college was granted by the British Crown, in 1769, and the court say it was not dissolved by the Revolution. Surely the right granted by your charter should command equal protection. I believe no court has ever dissented from the principles of this early decision.

As early as 1835 our own supreme court adopted and were governed by these principles to their fullest extent in the case of Gentry and Wife vs. Fry, (4th Mo. R., 120,) in which it was declared that the legislature has no power to grant a divorce because it would be impairing the obligations of a contract; and this decision, being acquiesced in, led to our present constitutional prohibition on this subject. Your charter is clearly a contract. It is a franchise granted by the State for the laudable purpose of promoting the construction of a railroad which is deemed beneficial to the people generally, and which the State desires to promote. This constitutes a sufficient consideration for the grant. The State being the party grantor, her obligations are to adhere to the grant and not obstruct the grantees in carrying into effect their franchise. The obligation on their part is to act up to the end and design for which the incorporation was created. How can this be done unless stock is subscribed and funds provided? The presumption is that in accepting the charter your company relied on the public aid which the charter guaranteed might be afforded, and without this guarantee it would not have been accepted. If the legislature, without the assent of the company, have the right to enact that such county courts shall not now subscribe to stock without the consent of two thirds of the qualified voters, has it not the same right to prohibit county subscriptions altogether? And, if so, why has it not the power to lay such onerous restrictions on all other subscriptions as will prevent the stock from being taken, and thus totally defeat the objects of the charter? For this I presume no one will contend. But I will pursue this subject no further.

My opinion is, that the legislature never intended such of the provisions of the 30th section of the act of 1855, nor of the 17th section of the act of 1865, referred to, as relate to a previous election, should be applied to or in any way affect the rights granted in your charter. It would be an unnecessary reflection on the legislature to think so. I

will therefore state my opinion to be, that if any county court through which your road may run, or adjacent thereto, should subscribe a reasonable amount of stock in behalf of their counties, such subscription would be legal, though made without any previous election.

Very respectfully,

F. P. WRIGHT.

17 In the circuit court of the United States for the western district of Missouri.

Be it remembered that at the November term A. D. 1872, of said court, and on the 20th day of said month, among other proceedings had were the following, to wit:

ALBERT H. NICOLAY *vs.* THE COUNTY OF HENRY. } Action on bonds.

Now, at this day, comes the plaintiff, by Dryden & Dryden, his attorneys, and also comes the County of Henry, by its attorneys, Phillips & Vest, and thereupon, by consent, this cause is continued until the next April term of this court, with leave to plaintiff to file amended petition within thirty days, defendant to file his answer sixty days thereafter.

And afterwards, to wit, in vacation of said court, and on the 5th day of February, 1873, the said plaintiff, by his attorneys, filed the following amended petition, to wit:

Amended petition.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In the circuit court of the United States for the western district of Missouri, November term, 1872.

18 ALBERT H. NICOLAY, PLAINTIFF, *vs.* HENRY COUNTY, IN THE STATE OF MISSOURI, defendant.

The plaintiff, Albert H. Nicolay, who is a citizen of the State of New York, for an amended petition, leave of the court to file the same being first had and obtained, states that the defendant, Henry County, a municipal corporation created by and existing under the laws of the State of Missouri, and a citizen of the State of Missouri, heretofore, on or about the first day of January A. D. 1871, by its certain writing obligatory, called bond No. 1, signed by William Jennings, the then presiding justice of the county court of said county of Henry, attested by J. N. Barline, the then clerk of said county court, and sealed with the seal of said county court, and bearing date the day and year aforesaid, and herewith filed, acknowledged itself to be indebted and bound to the Tebo & Neosho Railroad Company, to the use and in the name of the Clinton & Memphis branch of the Tebo & Neosho Railroad, and promised to pay to the said Tebo & Neosho Railroad Company, or to the bearer of said writing obligatory, the sum of one thousand dollars, at the Na-

tional Park Bank, in the city of New York, on the first day of
19 January, 1881, together with the interest thereon from the first day of January, 1871, at the rate of ten per centum per annum, in semi-annual installments of fifty dollars each, payable on the first days of July and January of each year, on the presentation and delivery at said bank of certain coupons severally thereunto subjoined. And the plaintiff says that he is the bearer and holder of said bond, and also of the coupon for the second installment of interest, amounting to fifty dollars, due thereon on the first day of January, 1872, which was subjoined to said last-named bond as aforesaid, and is now also herewith filed; that although when said installment of interest became due, to wit, on said first day of January, 1872, said last-named coupon was duly presented for payment at the said National Park Bank, in the city of New York, and payment thereof was requested, yet the same was not nor has been since paid, but remains now due and wholly unpaid; wherefore plaintiff prays judgment for the said last-named sum of fifty dollars, with interest thereon from the first day of January, 1872, and his costs herein. * * * * *

And afterwards, to wit, on said 4th day of February, 1873, the parties aforesaid, by their respective attorneys, filed the following acknowledgment of service and stipulation as to answer, to wit:

In the circuit court of the United States for the western district of Missouri.

20 ALBERT H. NICOLAY, PLAINTIFF,
vs.
HENRY COUNTY, IN THE STATE OF MISSOURI, defendant.

We acknowledge service of copy of plaintiff's first amended petition filed in the above-entitled cause.

PHILLIPS & VEST,
Attys. for Def'd.

We hereby consent that the answer of defendant in the above-entitled cause, made to the first count of the said amended petition, shall be considered as made to all the counts of the petition, the object being to save the labor to defendant's counsel of repeating the same matter of defence to all the said counts.

DRYDEN & DRYDEN,
Attys. for Plff.

And afterwards, to wit, in vacation of said court, and on the 24th day of February, 1873, the said defendant, by its attorneys, filed the following answer to amended petition herein, to wit:

Answer.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In the circuit court of the United States for said district.

21 ALBERT H. NICOLAY, PLAINTIFF,
vs.
THE COUNTY OF HENRY, IN THE STATE OF Missouri, defendant.

Now on this day, by leave of the court first had and obtained, comes

the defendant by his attorneys, and for answer to the amended petition filed herein, and especially to the first count thereof, as by agreement of counsel filed herein, says, whether or not the said plaintiff is a citizen of the State of New York she has no knowledge or information thereof sufficient to form a belief.

Defendant admits that the presiding justice of the county court of said County of Henry, and one J. N. Barlow, as clerk thereof, claiming to act as the agents of said County, did, of the date alleged in the petition, issue a certain writing in the form of an obligation, called bond No. 1, but whether or not such bond was attested by J. N. Barline, the then clerk of said county court, this defendant has no knowledge or information thereof sufficient to form a belief.

Defendant, admits that by the terms of the bond so issued as first aforesaid the said justice did acknowledge the said County to be indebted and bound to the Tebo and Neosho Railroad Company,
22 to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, payable at the place and time, and bearing the rate of interest in the petition alleged, with coupons attached as alleged. Whether or not said coupons when the installments of interest thereon became due were duly presented for payment at the National Park Bank, in the city of New York, and payment thereof requested, defendant has no knowledge or information thereof sufficient to form a belief.

Defendant, further answering to the different alleged causes of action in the petition, says the plaintiff ought not to maintain his said actions, for the reasons that the defendant is not bound in law or equity to pay the same; that the said bonds and coupons were issued without the authority of the law or the consent of this defendant, and are fraudulent and void; that the said justice and clerk had no authority or power to bind this defendant by such written instruments except as directed by the order of said county court to so issue the same in such case as said court was authorized and empowered by law to so direct and order.

And this defendant alleges that the said county court never ordered or directed the said justice and clerk to issue said bonds or cou-
23 pons, or any of them, to the Tebo and Neosho Railroad Company to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad.

Defendant, further answering, states the whole facts of this matter to be, that heretofore, to wit, in the month of , 1870, certain scheming speculators conceived the project of starting the construction of a railroad from or near Kansas City, in this State, to run in an easterly direction through the town of Clinton, in said county of Henry, and thence on toward the city of Memphis, in the State of Tennessee. And being wholly dependent for the prosecution of said enterprise upon aid and money to be obtained from the counties along the line of said projected road, and to avoid the provisions of the 14th section of the 11th article of the constitution of the State of Missouri, then and yet in force, which prohibited the said county of Henry from being a stockholder in or loaning its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county at a regular or special election therein should assent thereto, they, the said speculators, conceived the idea of denominating this projected road a branch of the Tebo and Neosho Railroad, a corporation duly chartered by act of the legislature of the State of Missouri, approved Jan'y 16, 1860, so as to enable them by adroit management to obtain from the said

24 County of Henry, and other counties along the route of said road, subscriptions to aid in the said enterprise without first obtaining the assent thereto of two-thirds of the qualified voters of such county, as by the constitution aforesaid required. And accordingly they so designated that part of the road northeast of Clinton as "the Clinton and Memphis Branch," and that part southwest of Clinton, "the Clinton and Kansas City Branch of the Tebo and Neosho Railroad," assuming and asserting that the said branches were organized pursuant to the provisions of the charter of said Tebo and Neosho Railroad Company, and especially pursuant to and under the provisions of an act of the general assembly of the State of Missouri entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, 1868.

Defendant alleges that the then directory of the said Tebo and Neosho Railroad Company, to wit, in June, 1870, as this defendant is informed and charges, had knowledge of the facts aforesaid, and connived at the said fraudulent design, but with the distinct assurance and understanding between them that the object was to enable said speculators to obtain subscriptions, under cloak of the privileges of the charter of the Tebo and Neosho Railroad Company, from said counties, and especially said Henry County, to aid in building said projected roads, without having to obtain
25 the assent of the people of said county thereto, as aforesaid, and with the distinct understanding that the said projected road was not in fact to be a branch road of said Tebo and Neosho Railroad, but was in fact and law to be entirely separate from and independent of the same, its stock to be separate, as also its control and management; and that said Tebo and Neosho Railroad Company have in fact done nothing more, nor any other act or thing looking to the recognition or establishment of said branch roads. Yet defendant alleges that said speculators, afterwards, in pursuance of their said scheme, to wit, on the 1st day August, 1870, without the solicitation, knowledge, or consent of said Tebo and Neosho Railroad Company, obtained from the county court an order (a certified copy of which is herewith filed) by which it is among other things, "considered, ordered, and adjudged by the court, that the county of Henry, in the State of Missouri, do subscribe and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting in the aggregate to the sum of one hundred and fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company, and under the act of the
26 general assembly of the State of Missouri entitled 'An act to aid the building of branch railroads in the State of Missouri,' approved March 21st, A. D. 1868, and in accordance with the resolutions and orders of the board of directors of said Tebo and Neosho Railroad Company, establishing said branch railroad, and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870; the said capital stock to be paid for by the issue and delivery to the committee appointed to construct said *said* branch road of the coupon bonds of the County of Henry of the denomination of one thousand dollars each, bearing date the 1st day of January, A. D. 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds shall also be payable, ten years after the date thereof, the said bond to be signed by the presiding justice of this court, and attested by the clerk

of this court, under the seal thereof, and the coupons to be signed by said clerk."

Defendant alleges that the said order was and is the only order (save a similar one made touching the so-called Clinton and Kansas City Branch) ever made by said county court directing the issue of any bonds for the use of or pertaining to said so-called Clinton and Mem-
27 phis Branch of the Tebo and Neosho Railroad, and the same is the order and none other referred to and named on the face of the bonds mentioned and declared upon in the plaintiff's petition under which the said bonds and coupons so mentioned as aforesaid in the petition of plaintiff were issued.

Defendant alleges that said county court had no right or authority in law to make said order, for that this defendant alleges that so-called Clinton and Memphis Branch road never had any legal existence, and if in fact and law it did so exist, it was under and pursuant to the provision of the said act of the general assembly of the State of Missouri, approved March 21st, 1868, which in purpose and effect created said branch an independent franchise, with privileges and powers not guaranteed by or derivable from the charter of said Tebo and Neosho Railroad; and defendant claims and alleges that the said county court had no power and authority to subscribe said stock to said branch roads, as attempted by its said order, without first having obtained the assent thereto of two-thirds of the qualified voters of said county, as in such case provided and required by the constitution of the State of Missouri as aforesaid.

And defendant alleges the fact to be, that the assent of the qualified voters of said County of Henry was not so obtained thereto; that
28 no election therein was ever had or vote taken or permitted to be taken in the matter of issuing said bonds, as by the constitution and laws of the State of Missouri it should have been taken and permitted.

And defendant further alleges and claims that said bonds were neither ordered to be issued to nor were they in fact issued or delivered to said Tebo and Neosho Railroad Company, nor were they ever received by it, directly or indirectly; but the same were by said order directed to be issued and delivered to a so-called committee, who were in fact said speculators, a self-appointed committee, to construct said branch road, who received said bonds; and the said Tebo and Neosho Railroad Company never had ought to do with said bonds or their proceeds.

And defendant further claims and alleges that even if said county court had the power to issue the bonds of said county for the purposes aforesaid, yet it had no authority in law or otherwise to provide or contract for the payment of interest thereon at the rate of ten per centum per annum, payable semi-annually or otherwise; for by the law of Missouri, in such by statute made and provided, the said county was not permitted to make such bonds bear a higher rate of interest than seven per centum per annum. Wherefore defendant holds and avers that
29 the plaintiff cannot, and ought not to, maintain his said action for the recovery of said ten per cent. interest or any part thereof.

Defendant further alleges that after said speculators had obtained as aforesaid the adoption of said resolutions, calling said enterprise a branch of the Tebo and Neosho Railroad, and prior to the issuing of the bonds and coupons aforesaid by said county court, the said Tebo and Neosho Railroad Company, pursuant to statute in such case made and provided, by articles of agreement and sale, did sell and transfer all its rights, franchises, and property to the Missouri, Kansas &

Texas Railway Company, a corporation organized and existing under the laws of the State of Kansas, which was duly ratified and accepted by said Missouri, Kansas & Texas Railway Company, and was filed and entered of record in the office of the secretary of state of the State of Missouri, as by law provided.

Defendant avers that thereafter the said Tebo and Neosho Railroad Company passed to and vested in said Missouri, Kansas & Texas Railway Company, and said Tebo and Neosho Railroad Company, south of the Pacific Railroad, ceased to exist as such, and the authority, if any, of said speculators and committee claiming to act for and in behalf of said branch roads, so far as their authority therefor was claimed to emanate from the said Tebo and Neosho Railroad Company, was
30 revoked and annulled; and the act of the said county court in so issuing said bonds and coupons was unauthorized and nugatory.

And the defendant alleges that the bonds and coupons were not issued or delivered to said Missouri, Kansas & Texas Railway Company, nor at its solicitation, nor with its knowledge and consent, nor were the same ever delivered to it, nor had it ought to do therewith, directly or indirectly; nor has it ever had ought to do with said branch roads, or either of them, or in any manner or form recognized their existence, but the same have ever been wholly independent the one of the other.

And defendant, further answering, says that it has not only failed and declined to pay the interest on said bonds and coupons for the reasons aforesaid, but for that heretofore, to wit, on the 11th day of January, 1872, the State of Missouri, at the relation of W. H. Pickerell, circuit attorney in and for the 22d judicial circuit of the State of Missouri, filed his *his* petition with and made application, in vacation, to the Hon. William L. Avery, judge of the Henry County court of common pleas, in and for said county of Henry, he and said common pleas court having jurisdiction in the premises, setting up and alleging, among other facts, the matters and things pleaded hereinbefore, substantially,
31 and alleging fraud and collusion in the obtaining of said order of subscription from said court, and the issuing of said bonds and coupons, and showing that said justices were threat'ning to enforce by levy and sequestration and sale the collection of the interest on said bonds and coupons, and that the citizens and tax-payers had no adequate remedy at law against the threatened injury, &c., and praying for an inju'ction against the justices of the said county court, and the sheriff and collector of said county, restraining them and their successors in office from any levy or sale, or other and further act towards the collection of said tax, or such as should thereafter be imposed for or on account of said bonds and the interest thereon, and restraining them from making any other or further assessment on account of said bonds or any interest to accrue thereon, and from doing any further or other act whatever looking to the enforcement of the payment or liquidation or funding of said bonded debts or interest; that on the appearance of the parties, and hearing of the cause before said judge, a temporary writ of injunction was granted by him, as prayed for, on the 7th day of February, 1872, made returnable before him, in term time, on the 2d Monday
32 in March, 1872; that at said term, and on application of the defendants in said injunction suit, a change of venue was awarded therein to the circuit court of said county, and afterwards, to wit, at the August term, 1872, of said circuit court, the said matter of injunction coming on for final hearing and trial, the same was taken up and submitted to the court, and after hearing the same, the said circuit court having jurisdiction over the subject-matter and the parties, by its judgment and

decree then and there rendered and made of record, made said injunction perpetual, in accordance with the prayer of said petition, which said judgment and decree is unappealed from, unreversed, and is in full force and effect. A certified copy of the petition and the record *and the record* and judgment in said injunction suit are filed with the first answer herein.

Defendant alleges that of all the matters and facts and proceedings hereinbefore pleaded, the said plaintiff, at the time of the institution of this suit, and when he became the bearer of the bonds and coupons mentioned in his petition, had notice, and is affected and bound thereby.

Wherefore, in view of the premises, the defendant says the plaintiff ought not to maintain his said action; and defendant prays judgment that the plaintiff take nothing by his said petition, that defendant
33 go hence with judgment for its costs in this behalf laid out and expended, and for all proper relief.

PHILLIPS & VEST,
Attys for Deft.

And afterwards, to wit, at the April term, 1873, of said court, and on the 21' day of said month, the plaintiff, by his said attorneys, filed the following demurrer to defendant's answer, to wit:

Demurrer to answer.

In the circuit court of the United States for the western district of Missouri.

ALBERT H. NICOLAY, PLAINTIFF,
vs.
THE COUNTY OF HENRY, IN THE STATE OF Missouri, defendant.

The plaintiff demurs to the new matter set up in the answer of defendant to his amended petition, by way of defence to the several causes of action stated therein, on the grounds that it does not state facts sufficient to constitute a defense thereto, in this:

1. That as to the allegations that the officers of the County of Henry had no authority in law to issue the bonds and coupons sued on, it appears in said new matter that in the order made by the county court of said county, directing the issue of said bonds, and also in the said bonds themselves, it was and is recited that they were issued in pursu-
34 ance of certain laws of the State of Missouri, giving to the said county court power to issue the same, and *and* that said recitals are an estoppel against defendant; that the law was fully pursued, and that, if an election was required, such election was held, and that at such election the requisite number of votes to authorize the issue of said bonds were legally cast therefor.

2. That it does not by any thing alleged therein appear that plaintiff any notice of the irregularities complained of in said answer.

3. That neither by the law pursuant to which the said bonds were issued, as in said bonds and order it is recited, nor by any other law of the State of Missouri, was the said County or its county court forbidden to issue bonds bearing interest at the rate of ten per centum per annum, payable semi-annually, when issued for the purposes for which they were so recited to be issued, and that the statute referred to in said answer as limiting the rate of interest to seven per cent. does not apply to bonds issued for the purposes for which said bonds were issued and recited to be issued.

4. That as to the allegations that before the issue of said bonds there was a sale by the Tebo & Neosho Railroad Company to the Missouri, Kansas and Texas Railway Company, it appears in said answer that
35 it was recited in said bonds that the same were issued in payment of a subscription to the stock of the Clinton & Memphis branch of the Tebo & Neosho Railroad Company, made by the county court of defendant, under and by virtue of certain acts of the general assembly of the State of Missouri, giving to said court power so to subscribe, and issue bonds, and that it does not appear therein that plaintiff had any notice of the said alleged sale and transfer.

5. That as to the allegations in respect to a decree of the circuit court of Henry County rendered in a suit brought therein by the State of Missouri at the relation of Pickerell, circuit attorney, &c., it is not alleged that plaintiff was in any way a party to said suit, or had any notice of the same, and,

2ndly. No profert of the record of the said decree is made therein.

GRANT & SMITH,
DRYDEN & DRYDEN,
Att'ys for Pl'ff.

And afterwards, to wit, at the November term, 1873, of said court, and on the 21st day of said month, the following appears of record in said case, to wit:

ALBERT H. NICOLAY
vs.
HENRY COUNTY.

36 And now come the parties, by their attorneys, and the demurrer to the answer heretofore submitted to the court being seen and heard, it is ordered that said demurrer be overruled; and thereupon it is ordered that the replication filed in the case of Nicolay vs. St. Clair County shall be taken as filed herein.

And the said replication is as follows, to wit:

Reply.

In the U. S. C. ct. west. dist. of Mo.

ALBERT H. NICOLAY
vs.
HENRY COUNTY.

And now comes the plaintiff, by his attorneys, Grant & Smith, & for reply to so much of the answer filed herein as he is advised it is material for him to reply to, says it is not true that of all or any of the matters and allegations and facts set up in answer of defendant herein, plaintiff during all the time therein stated, or at any time, had notice, nor that he is affected thereby; and he prays as heretofore.

GRANT & SMITH,
Pl'ff.'s Attys.

And afterwards, to wit, at the April term, 1873, of said court, and on the 22d day of said month, the above-entitled cause coming on
37 for trial, the following appears of record therein, to wit:

Judgm't.

ALBERT H. NICOLAY
vs.
THE COUNTY OF HENRY.

Now come the parties, by their respective attorneys, the plaintiff by Grant & Smith and the defendant by Phillips & Vest, and thereupon come a jury, to wit, Wm. A. Curry, John F. Ellis, B. F. Gibson, Samuel T. Harrison, Charles Kames, John S. McFarland, M. L. Laughlin, John S. Miller, Albert Newman, Chas. L. Wells, Shadrich Dickens, and Isaac Dwight, twelve good and lawful men, duly empanelled and sworn well and truly to try the issues joined between the parties, upon their oaths do say:

"We, the jury, find for the plaintiff, and assess his damages at the sum of nineteen thousand six hundred and forty-eight dollars and forty-six cents.

"JOHN S. McFARLAND,
"*Foreman.*"

Therefore it is considered, ordered, and adjudged by the court that the plaintiff do recover of said defendant the sum of nineteen thousand six hundred and forty-eight dollars and forty-six cents, the damages by the jurors aforesaid assessed, and also his costs and charges in this behalf laid out and expended, and have thereof execution.

And afterwards, to wit, at the same term of said court last
38 aforesaid, and on the 25th of April, the defendant, by its attorneys, filed bill of exceptions herein, which was allowed and signed by the court; which said bill of exceptions is as follows, to wit:

In the circuit court of the United States for the western district of Missouri.

ALBERT H. NICOLAY, PLFF.,
vs.
THE COUNTY OF HENRY, DEFT.

Be it remembered that on the trial of the above-entitled cause, at the April term, 1874, of said court, and on the 3d day of the term, it being the 22d day of April, 1874, the plaintiff, to *to* sustain the issues on his part, read in evidence the following bond, to wit:

Henry County bond. $1,000. *State of Missouri.*

Interest ten per cent. per annum, payable semi-annually on the first days of January and July.

Know all men by these presents that the County of Henry, in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, which sum the said County hereby promises to pay to the Tebo and Neosho Railroad Compay, or bearer, to aid in building said branch railroad, at the National Park Bank, in
39 the city of New York, on the first day of January, 1881, together

with interest thereon at the rate of ten per cent. per annum, which interest shall be paid semi-annually on the first days of July and January of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

This bond is issued under and in pursuance of an order of the county court of Henry County in the State of Missouri, and in pursuance of and by authority of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Tebo and Neosho Railroad Company," approved January 16, 1860, and of an act of the general assembly of the State of Missouri entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, A. D. 1868.

In testimony whereof the said County of Henry has executed this bond, by the presiding justice of the county court of Henry County, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing the seal of said court.

This done at the city of Clinton, County of Henry aforesaid, this first day of January, A. D. 1871.

[SEAL.] WILLIAM JENNINGS,
Presiding Justice of the County Court of Henry County.

Attest:

J. N. BARLINE,
Clerk of the County Court of Henry County.

40 The plaintiff also read in evidence the following coupon, to wit:

$50.] CLINTON, HENRY COUNTY, *January* 1, 1871. [$50.

The County of Henry acknowledges to owe the sum of fifty dollars on the first day of July, 1873, being interest on bond No. 120 for one thousand dollars. This coupon is payable at the National Park Bank, in the city of New York.

(Signed) J. N. BARLOW,
Clerk Henry County Court.

The plaintiff also produced and read in evidence all the other coupons named in the said several counts of his petition, and which, except as to numbers, are of the same tenor as the one above copied, and then rested his case.

The defendant, to sustain the issues on its part, read, by consent of parties, the order of subscription by the county court of defendant, as the same is set up in defendant's answer.

The defendant then read in evidence the depositions of John N. Barlow, Jared Stevenson, R. S. Stevens, Cyrus Newkirk, and Charles H. Snyder, to wit:

JOHN N. BARLOW, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

41 I reside at Clinton, Henry County, Mo. I am thirty-two years old, and I am at present acting deputy county clerk. I have resided in Henry County about ten (10) years. I held the office of county clerk of Henry County from July, 1865, till January, 1871. I have held the appointment of deputy clerk since September, 1872, but have been working in the office ever since the expiration of my term as clerk.

The paper shown witness, and marked "Exhibit A," he states to be a

true copy of the records of the county court of Henry County in reference to the subscriptions to the capital stock of the Clinton & Memphis Branch of the Tebo and Neosho Railroad Co.

I examined the records of the county yesterday and read over Exhibit A this morning, and think, from its appearance, that it is a true copy of the record. This transcript (Exhibit A) is certified by my principal, Charles H. Snyder, the present county clerk of said county. There is no other order of record in said court making subscriptions to the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company except what is contained in Exhibit A.

Ques. Is there any order of record by the county court of Henry County revoking a subscription to the capital stock of the Tebo
42 and Neosho Railroad Co. to the use and in the name of said branch road?

Ans. There is none except as contained in Exhibit A.

Ques. Is the order contained in Exhibit A the only order of subscription made by the county court of Henry Co. pertaining in any way to said branch road?

Ans. It is the only order of subscription. I made all the record entries of the court relative to this matter.

Ques. Was there any order made by said county court directing an election, either general or special, to be held to obtain the consent of the qualified voters of said county to the making of said subscription?

Ans. There was no order made for any such election to be held. No such election was ever held in that county to my knowledge. No such election could have been held in said county during the time I was in office without my knowledge. No poll-books were ever made out in my co. for such an election. No returns were ever made to my office of any such election. There are no orders of record made by said county court in reference to such an election, to the best of my knowledge and belief.

Cross-examination:

43 I have not compared Exhibit A with the record entries of which it purports to be a copy. I can't say that I have ever made an examination of the record for the purpose of finding if there were any other orders with reference to making subscriptions to the Clinton and Memphis Branch of the Tebo & Neosho Railroad Co., but know from general knowledge there was no other order making subscriptions to said road, having made the record myself. There were other orders of the court with reference to the signing & delivery of the bonds, but none other making subscriptions to said road. I remember of the bonds being signed, and my recollection is that the bonds were delivered to Mr. Stone, who gave his receipt for them, but I am not positive of this. Think Mr. Stone afterwards took up his receipt and gave in its place certificates of stock in the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company. I think I delivered the bonds to Mr. Stone; they were in my possession. I think that Mr. Stone was at the time acting in the capacity of president of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Co. and I delivered the bonds to him as such, acting as clerk and under the direction of the court.

William Jennings was the presiding justice of the county court
44 of Henry Co. at the time of signing and delivery of the bonds.

There were one hundred and fifty (150) of the bonds that I delivered to Stone, face value being one hundred and fifty thousand dol-

lars, all signed by William Jennings as presiding justice, and myself as clerk of the county court.

Re-examined:

Mr. D. C. Stone, spoken of as above, at this time was keeping a broker & exchange dealer's office in Clinton, Henry Co., Mo. I don't know of my own knowledge of Mr. Stone's having any connection with the Tebo and Neosho Railroad Co. at this time. The reason I think D. C. Stone was president of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, was because he signed the certificate of stock as president given in exchange for his receipt for bonds.

Ques. Was there ever any certificate of stock issued to the Tebo and Neosho Railroad Company or the Missouri, Kansas & Texas Railway Company to the County of Henry on account of the subscription of said county above referred to?

Ans. There was not.

JARED STEPHENSON, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

45 I am forty-nine (49) years old and reside in Henry County, Mo. I am a farmer by occupation and have resided in the county about fifteen (15) years. I held the office of county treasurer of Henry County, commencing January 1st, 1865, for two years. I also held the office of county justice from January 1, 1869, up to present time. Was a member of county court in 1870. William Jennings was presiding justice of the county court until January 1, 1870. I was on the bench of the county court when an order was made subscribing stock to the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company as in Exhibit A. The court never made but one order subscribing stock to said railroad company, with my knowledge.

Ques. Did the court, during your term of office, make any other subscription than that for the use or benefit of, or in which the Clinton and Memphis Branch of the Tebo and Neosho Railroad was concerned or mentioned?

Ans. They did not. The court never did make an order for an election to obtain the sense of the people on this subscription to the said railroad co. A petition was presented to the court asking them to make such order, but the court refused to consider the petition, giving as their reasons for so doing, that they knew the people would not vote for it, and they would lose the road. No such election was

46 ever in fact held in the county to my knowledge. This subscription was made at the instance and upon the application of a number of persons in Clinton, among whom were, I think, A. D. La Due, Judge McBeth, William Weaver, and others.

Ques. Do you know who got those bonds?

Ans. I do not, of my own knowledge.

Ques. Did your county ever receive any certificate of stock from the Tebo & Neosho Railroad Company, or the Missouri, Kansas and Texas Railway Company for this subscription?

Ans. They did not to my knowledge; they may have done so, and I not known it.

Ques. Did you ever hear of any certificate of stock being issued to your county by the Tebo and Neosho Railroad Company, or the Missouri, Kansas and Texas Railway Company for such subscription?

Ans. I never heard of it.

Quest. Were these subscriptions in question made with your consent and approbation?

Ans. They were not. The county subscribed one hundred and fifty thousand dollars' worth of bonds to this branch road, and fifty thousand to the Kansas City and Clinton Branch, making in all two hundred thousand dollars.

Cross-examined:

Ques. Was not one reason given at the time the question of
47 subscription was agitated, why the court should not order an election, that a majority of the judges of the court that they had power under the charter of the Tebo & Neosho Company, and under an act of the State of Missouri, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, 1868, to make the subscription without submitting it to a vote of the people?

Ans. This was given as a reason for their action at the time by the court; also that it would involve the county in expense.

R. S. STEVENS, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

I reside in the city of Sedalia, county of Pettis, State of Missouri. I am general manager of the Missouri, Kansas & Texas Railway Company, and have held that position for over three years. Ever since the organization of the company, I have had the management and control of said company's road, extending southwest from Sedalia. The Tebo & Neosho Railroad Company was merged in, and its rights, franchises and property transferred and sold to, the Missouri, Kansas & Texas Railway Company, October 11, 1870, as evidenced by certified copies of contract and indenture hereto annexed and marked "Exhibit B,"
48 the original being in New York with the records of the company. Since the completion of said contract, the property, rights, and franchises of the Tebo & Neosho Railroad Company have been under the exclusive control and management of the Missouri, Kansas & Texas Railway Company, and since that time the officers and directors of the Tebo and Neosho Railroad Company, as such, have had nothing to do with, nor any control over the road. The Missouri, Kansas & Texas Railway Company has never since its organization, nor since the transfer and sale aforesaid, authorized or directed the creation or building of the so-called Clinton and Memphis Branch of the Tebo and Neosho Railroad Company.

The Missouri, Kansas & Texas Railway Company have never solicited, or authorized any one for it to solicit from the county court of Henry Co., Missouri, or from any other county, subscriptions to the capital stock of either of said companies, or of said so-called branch road, or to aid in its construction. Neither I or my company have ever authorized the construction of said branch road; neither I or my company have ever employed or authorized any agent or agents to solicit subscriptions therefor, or in any way have aided in the building of such branch road. My company has never in any way recognized said
49 subscription, nor accepted the same, nor employed it in the building of said branch road; none of the parties connected with the management of said branch road has ever reported to my company any of their acts and doings in connection with said branch roads, or received any directions or instructions from me and my company touching the same; said branch roads have never had any authority from or been in any way authorized by me or my company, nor have I or they ever sanctioned the same. My company has never issued any certifi-

cates of stock for subscriptions of said county court to said branch road, nor is it under any obligation to issue any such certificates.

CYRUS NEWKIRK, of lawful age, being produced, sworn, and examined, on the part of the defendant, deposeth and saith: I reside in the city of Sedalia, Pettis County, Missouri. I am fifty (50) years of age, and am president of the First National Bank of Sedalia. In 1870 I was a director of the Tebo and Neosho Railroad Company, and its treasurer. In that year, about the month of June, I think, Peter A. La Due, and perhaps other citizens about Clinton, Missouri, desiring to forward the project of a railroad from Kansas City, Missouri, in the direction of Memphis, Tenn., and in order to avail themselves of the benefits
50 and privilege secured by the charter of the Tebo and Neosho Railroad Company, in the particular of obtaining subscriptions from the county courts of the respective counties along the route of said projected road, without having to obtain the consent thereto of two-thirds of the qualified voters of such counties, sought permission of the directory to designate the road as branches of the Tebo and Neosho Railroad Company, the one to be designated the Clinton and Kansas City, and the other as the Clinton and Memphis branches of the Tebo and Neosho Railroad Company, to which we consented, with the understanding between us and them that the Tebo and Neosho Railroad Company was to be in no wise responsible for the acts or liabilities of such branches, nor was the company *nor was the company* to build or construct them. The branch roads, in fact, were to be entirely independant of the company. Our company never solicited any subscription from the county court of Henry County to aid in the building of said branch roads. Our company has had nothing to do with procuring subscriptions or building said branch roads. No one connected with said branches, or either of them, has ever reported to the Tebo & Neosho Railroad Company, nor has our company ever accepted
51 such subscription or subscriptions, or in any way ratified them. My company was not consulted about said branch roads, nor had anything to do with them. Nor has my company ever issued any certificates of stock to Henry County for subscriptions to said branch roads, or either of them, nor have we ever contracted to do so. My company was sold out and transferred to the Missouri, Kansas and Texas Railway Company, on the 11th day of October, 1870, as evidenced by Exhibit B filed with these depositions. From and after that date the company passed under the exclusive management and control of the Missouri, Kansas & Texas Railway Company, and from and after that date the officers and directors of the Tebo and Neosho Railroad Company, as such, ceased to have anything to do with that part of the road. I am acquainted with Mr. D. C. Stone, late of Clinton, Henry County, Missouri; have known him some four or five years. Mr. Stone never was officially connected with the Tebo and Neosho Railroad Company. He never was employed to solicit or obtain subscriptions from the counties for the Tebo and Neosho Railroad Company, as agent or otherwise, so far as I know. No bond or bonds issued by Henry County for the use and benefit of or pertaining to the Clinton and Memphis Branch
52 of the Tebo & Neosho Railroad Company, or the Clinton and Kansas City Branch of said road, ever came into my hands as treasurer of the Tebo and Neosho Railroad Company, nor did the company receive any such bond to my knowledge.

CHARLES H. SNYDER, of lawful age, being produced, sworn, and examined, on the part of the defendant, deposeth and saith: My age is

thirty-four, (34;) I reside at Clinton, Henry County, Missouri, and by occupation county clerk of said county; have been clerk of the said court since January 1, 1871. I have examined fully the records in my office, and all entries therein made in relation to subscriptions by said county pertaining to the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company. (Witness says that he has here in his possession the said records of said county court. Witness is shown paper filed herewith and marked "Exhibit A.") I recognize the Exhibit A as being a copy made by me from the records of said court. It is a true and correct copy, and was compared by me with the record. The record shows the following protest against said order of subscription by Jared Stephenson, one of the justices of said court, which is of the same date and following in consecutive order, the above-mentioned order
53 of subscription, viz: "Jared Stephenson, dissenting, protests against the above order of the court for the following reasons: First. The court is prohibited, by the seventeenth (17th) section of chapter sixty-three (63) of the general statutes of Missouri, from taking the stock it subscribed, or to loan its credit to said proposed railroad without having first ordered an election at which two-thirds ($\frac{2}{3}$) of the qualified voters of Henry County should give their assent to such subscription; there having been no such election the said subscription is illegal and void.

"Second. Because there is no legal corporation organized under any law of this State by the name of the Clinton and Memphis Branch of the Tebo & Neosho Railroad, nor any lawfully authorized corporation by the name of Clinton & Kansas City Branch of the Tebo & Neosho Railroad.

"Third. Because the county court has no right to do indirectly what she is prohibited from doing directly by the statutes before cited, namely, to vote money and aid to a railroad organized since the adoption of the new constitution of Missouri, without the preliminary steps of an election, at which two-thirds ($\frac{2}{3}$) of the qualified voters of the county should vote in favor of the subscription.

54 "Fourth. Because, by the order of the county court of last term, the subscription was agreed to be voted by a majority of this court, upon a petition of the majority of the tax-payers of Henry County, and there has been no legal or sufficient evidence produced to the court that said majority have so petitioned.

"Fifth. Because, in view of the burdensome taxation already imposed upon the citizens of Henry County, I consider this new tax ruinous in its tendencies, and inexpedient at this time."

In making out the transcript, Exhibit A, I did not include said protest, for the reason that I was only asked to make out a copy of the order of subscription to this branch of the road. I have examined the records and the Exhibit A; and the above copy of the protest embraces the whole of the orders of record making the subscription. This is the only order I can find in the records in relation to any subscription, or in any way pertaining to or for the use or benefit of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company. No election was held in Henry County authorizing the court to make the subscription. I resided there at the time.

EXHIBIT A.

55 At a regular term of the Henry County court, begun and held at the court-house, in the town of Clinton, on Monday, the

1st day of August, 1870, the following, among other proceedings, was had on Thursday, the 4th day of August, 1870, it being the fourth day of said term:

In the matter of the application of Clinton and Memphis Branch of the Tebo and Neosho Railroad for a subscription to the capital stock of said branch road, from the county of Henry, to aid in the construction of said branch road.

The court, after due consideration, being fully satisfied that the resources of the county will be materially enlarged, and that additional and profitable markets will be opened to the people of the county by the building of said branch railroad, it is considered, ordered, and adjudged by the court, that the County of Henry, in the State of Missouri, do subscribe for and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting, in the aggregate, to the sum of one hundred and fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and
56 under the act of the general assembly of the State of Missouri, entitled "An act to aid the building of branch railroads in the State of Missouri," approved March 21, A. D. 1868, and in accordance with the resolution and orders of the board of directors of said Tebo and Neosho Railroad Company, establishing said branch railroad company and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, the said capital stock to be paid for by the issue and delivery to the committee appointed to construct said branch road, of the coupon-bonds of the county of Henry of the denomination of one thousand dollars each, bearing date the 1st day of January, A. D. 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds shall also be payable ten years after the date thereof; the said bonds to be signed by the presiding justice of this court, and attested by the clerk of this court under the seal thereof, and the coupons to be signed by said clerk; the said subscription being made, however, upon the following express conditions, viz:

1st. That the said branch railroad shall be located from a point
57 within or near the corporate limits of the town of Clinton, and thence to the southern limits of the county of Henry, in the general direction of Osceola, in the county of St. Clair, and in the general direction of Memphis, in the State of Tennessee.

2d. That the proceeds of said bonds shall be applied to and expended in the construction of said branch railroad within the limits of the county of Henry, southwardly from Clinton.

3d. That none of the bonds aforesaid shall be issued and delivered, as aforesaid, until the graduation and masonry upon that portion of said branch road lying within the limits of Henry County shall have been let to contract to responsible persons, and the court shall be reasonably satisfied of the responsibility of such persons.

4th. That all the coupons for interest which shall have matured, or which would have matured had the said bonds been issued and delivered prior to such letting or lettings to contract, shall, upon the delivery of said bonds, as aforesaid, be cut off and retained by the county treasurer, and destroyed in the presence of this court.

Ordered, further, that Joseph Hillegas be and is hereby appointed the

agent of the county to subscribe the stock aforesaid, to aid in the
58 construction of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, in accordance with the terms of the foregoing order, and that he cause to be prepared and signed the said coupon-bonds of the county of Henry, and that the same be delivered only in accordance with the foregoing order.

In the matter of the application of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, for a subscription to the capital stock of said branch railroad, to aid in the construction thereof within the limits of the county of Henry, by and from the said county.

The court being fully advised in the premises, order and adjudge as follows, that is to say:

It is ordered and adjudged by the court, that the County of Henry, in the State of Missouri, do subscribe for and agree to take five hundred shares of the capital stock of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting in the aggregate to the sum of fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the act of the general assembly of the State of Missouri, entitled, "An act to aid the building of branch railroads in the State of Missouri,"
59 approved March 21st, A. D. 1868, and in accordance with the resolutions and orders of the board of directors of the Tebo and Neosho Railroad Company, establishing said branch railroad, and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, and that said subscription and capital stock be paid for by the issue and delivery to the committee appointed to construct said branch road, of the coupon-bonds of the county of Henry, of the denomination of one thousand dollars each, bearing date the first day of January, A. D. 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds shall also be payable ten years after the date thereof, the said bonds to be signed by the presiding justice of this court, and attested by the clerk of this court under the seal thereof, and the coupons to be signed by the said clerk, the said subscription being made, however, upon the following express terms and conditions, to wit:

1st. That the said branch railroad shall be located within the county of Henry, from a point within or near the town of Clinton, and thence in a general northwestern direction, so as to secure to this county
60 a connection by railway with Kansas City, in this State.

2d. That the proceeds of said bonds shall be applied to and expended in the construction of said branch railroad, within the limits of the county of Henry, upon the line aforesaid.

3rd. That none of the said bonds shall be issued and delivered, as aforesaid, until the means to build the road-bed of said branch railroad and prepare the same for the iron, has been gathered up and secured to said branch road within the county of Johnson, or within the counties of Cass and Jackson, and the graduation and masonry, on the line of the said branch railroad, northwestwardly from the county of Henry, has been let to contract to responsible persons, and sufficient work has been done thereon to assure its completion to the Henry County line, and the graduation and masonry has also been let to contract to responsible persons, of which the court shall reasonably be satisfied, within the limits of Henry County.

4th. That all the coupons for interest which shall have matured, or would have matured had the said bonds been issued and delivered prior to such letting or lettings to contract, shall upon the delivery of said bonds, as aforesaid, be cut off and retained by the county treasurer, and destroyed in the presence of the court.

61 Ordered, further, that Joseph Hillegas be and he is hereby appointed the agent of the county to subscribe the stock aforesaid, to aid in the construction of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, in accordance with the terms of the foregoing order, and that he cause to be prepared and signed the said coupon-bonds of the county of Henry, and that the same be delivered only in accordance with the foregoing order.

STATE OF MISSOURI,
County of Henry, ss:

I, C. H. Snyder, clerk of the Henry County court, for and within the county of Henry and State of Missouri, do hereby certify that the above and foregoing is a true, full, and correct copy of the record in the above cause, as will fully appear of record in my office.

Given under my hand and official seal, at office in Clinton, this 15th day of November, A. D. 1871.

[SEAL.] C. H. SNYDER,
Co. Clerk.

(Endorsed:) Filed Nov. 19th, 1872. Alfred S. Krekel, clerk.

EXHIBIT B.

OFFICE OF SECRETARY OF STATE,
City of Jefferson, Missouri.

62 I, Eugene F. Weigel, secretary of state of Missouri, do hereby certify that the annexed pages contain a true, complete, and full copy of the certificate of the president and secretary of the Tebo and Neosho Railroad Company, of the sale and merger of said company to and with the Missouri, Kansas and Texas Railway Co., filed Nov. 26th, 1870, as appears by comparing the same with the original certificate, now on file, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed my official seal. Done at office this 6th day of October, A. D. eighteen hundred and seventy-one.

[SEAL.] EUGENE F. WEIGEL,
Secretary of State.
By CHAS. SCHAECKEL,
Chief Clerk.

We, the undersigned, Asa C. Marvin, president of the Tebo and Neosho Railroad Company, and Jonathan R. Barrett, secretary of said company, do hereby certify that at a meeting of the stockholders of the said Tebo and Neosho Railroad Company, convened at Sedalia, in Pettis County, State of Missouri, on the eleventh day of October, A. D. 1870, in pursuance of a call and notification of the stockholders of said
63 company, by the board of directors thereof, there being then and there present and represented and voting thirty-six thousand seven hundred and twenty-nine shares of the capital stock of said company, the following resolution was unanimously adopted, to wit:

Resolved, That the stockholders of the Tebo and Neosho Railroad

Company, do hereby sell, assign, and convey to the Missouri, Kansas and Texas Railway Company, a corporation organized under the laws of Kansas, all of its privileges, rights, powers, franchises, real estate, and other property, the whole or any part of which is in this State, excepting only such as belong to the extension of the Tebo and Neosho line north from Sedalia, via Boonville, Fayette and Moberly to the railroad bridge at West Quincy, declared July 2d, 1869, certificate of which, dated July 3d, was filed in the office of secretary of state; and we hereby authorize the officers of this company to execute the necessary papers for selling, conveying, & transferring the same, upon the following terms: That the Missouri, Kansas and Texas Railway Company shall create and issue its capital stock to the amount of thirty-six thousand five hundred and seventy-five shares to be exchanged, share for share, for the stock of the Tebo and Neosho Railroad Company, issued and agreed to
64 be issued, on its line of road, south from Sedalia to Fort Scott, and each of the towns, townships, cities, and counties south of Sedalia, and such individuals as, having heretofore subscribed to the capital stock of the said Tebo and Neosho Railroad Company, and paying for the same according to the terms of the subscriptions, shall be entitled to receive stock of the Missouri, Kansas and Texas Railway Company, as in this article is provided for, upon the surrender to the Missouri, Kansas and Texas Railway Company of the shares of stock in said Tebo and Neosho Railroad Company so held by them, properly endorsed to the said Missouri, Kansas & Texas Railway Company; and said Missouri, Kansas and Texas Railway Company shall assume all indebtedness incurred for the construction or otherwise of the line between Sedalia and Fort Scott; and the said Missouri, Kansas and Texas Railway Company, shall have, exercise, and enjoy, all the rights, powers, privileges, and immunities of the original charter of the Tebo and Neosho Railroad Company, and the several amendments thereto, in the same manner, and to the same extent, as has been heretofore exercised and enjoyed by this company, or by the several share-holders whose stock shall be so exchanged, either or both. And if hereafter it shall better suit the convenience of the Missouri, Kansas and Texas Railway
65 Company, or be more advantageous in their estimation, we, the said stockholders, do hereby authorize the board of directors of the Tebo and Neosho Railroad Company, to enter into an agreement of consolidation of the Tebo and Neosho Railroad Company with the said Missouri, Kansas & Texas Railway Company, on its issuing, share for share, its stock in exchange for the stock of the Tebo and Neosho Railroad Company, as above provided; and that the said resolution, after having been adopted by the majority of the stock of said Tebo and Neosho Railroad Company, as aforesaid, was and is entered of record upon the minutes of said company.

And we certify that the said sale and merger has been assented to in writing by the holders of more than a majority of all the capital stock of of the said Tebo and Neosho Railroad Company.

In testimony whereof, we, the said president and the said secretary, have hereunto set our names this 19th day of October, A. D. 1870, and caused the seal of the said Tebo and Neosho Railroad Company to be hereunto attached.

ASA C. MARVIN,
President of the Tebo and Neosho Railroad Company.

[SEAL.]

J. R. BARRETT,
Secretary of the Tebo and Neosho Railroad Company.

[5-ct. rev. st.]

66 (Endorsed:) Recorded on pages 316, 317, & 318, book R. R. Associations. Francis Rodman, secretary of state. Filed Nov. 26th, 1870. Francis Rodman, secy. of state.

EXHIBIT B.—Cont'd.

OFFICE OF SECRETARY OF STATE.
City of Jefferson, Missouri.

I, Eugene F. Weigel, secretary of state of Missouri, do hereby certify that the annexed pages contain a true, complete, and full copy of the certificate of the president and secretary of the Tebo and Neosho Railroad Company, of the action of the stockholders of said company, in regard to the sale of and merger of part of said road to and with the Missouri, Kansas and Texas Railway Company of Kansas, and certified copy of indenture and merger, filed January 4, 1871, as appears by comparing the same with the original of said certificate now on file, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at office, this 6th day of October, A. D. eighteen hundred and seventy-one.

[SEAL.]

EUGENE F. WEIGEL.
Secretary of State.
By CHAS. SCHAECKEL,
Chief Clerk.

67 This indenture, made the eleventh day of October, in the year of our Lord one thousand eiget hundred and seventy, between the Tebo and Neosho Railroad company, a corporation organized under the laws of the State of Missouri, party of the first part, and the Missouri, Kansas and Texas Railway Company, a corporation organized under the laws of the State of Kansas, party of the second part, witnesseth that, in consideration of the sum of one dollar paid to the said party of the first part by the said party of the second part, the receipt of which is hereby acknowledged, and of the benefits and advantages, them thereunto moving, and in accordance with a resolution of the stockholders of the party of the first part, passed on the eleventh day of October, A. D. 1870, and the consent in writing of a majority in interest of the stockholders of the party of the first part, the said parties of the first and second parts, have reciprocally covenanted and agreed to and with each other as follows:

The party of the first part doth hereby sell, convey, and transfer to the said party of the second part, all its privileges, rights, powers, franchises, real estate, and other property, the whole or a part of which is in this State, excepting only such as belong to the extension of
68 the Tebo and Neosho line north from Sedalia, via Boonville, Fayette, and Moberly, to the railroad bridge at West Quincy, declared July 2nd, 1869, certificate of which, dated July 3d, 1869, was filed in the office of secretary of state, and doth consent to a merger of the same, with the franchises, property, and rights of said party of the second part; and the said Missouri, Kansas and Texas Railway Company, party of the second part, shall have, exercise, and enjoy all the rights, powers, privileges, and immunities of the original charter of the Tebo and Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as has been heretofore ex-

ercised and enjoyed by the said party of the first part, or by the several shareholders in said company, whose stock shall be exchanged as herein provided, either or both; and the said party of the second part does hereby accept the terms and conditions of the within instrument.

And the said party of the second part further agrees to increase its capital stock thirty-six thousand five hundred and seventy-five shares, being an amount equal to the capital stock of said party of the first part, which has been subscribed and paid for by parties, individuals, or the several towns, cities, and counties situated along the portion of the road of the said party of the first part, so conveyed and merged,
69 and to issue and deliver to the holder of every share of the capital stock of the said party of the first part, so subscribed and paid for in good faith, or contracted to be issued as aforesaid, in exchange therefor, in accordance with the terms of the resolution of the stockholders of said party of the first part, passed October eleventh, 1870, authorizing this conveyance, one share of the par value of one hundred dollars of the stock of said party of the second part, subject to all calls and liabilities, if any, attaching to the stock so exchanged.

In witness whereof the said parties hereto have caused their respective seals to be hereto affixed, and these presents to be signed by their respective presidents, the nineteenth day of October, A. D. 1870.

The Tebo and Neosho Railroad Company
[SEAL.] By ASA C. MARVIN, *President.*

The Missouri, Kansas & Texas Railway Company,
[SEAL.] By LEVI PARSONS, *President.*

STATE OF MISSOURI,
County of Pettis, ss:

Be it remembered, that Asa C. Marvin, who is personally known to the undersigned, a notary public within and for said county and State, to be the person whose name is subscribed to the foregoing instru-
70 ment of writing as a party thereto, as president, and to be the president of the Tebo and Neosho Railroad Company, a party thereto, this day appeared before me and acknowledged that he executed and delivered the same as the voluntary act and deed of the said Tebo and Neosho Railroad Company, for the uses and purposes therein contained.

In witness whereof I have hereunto set my name and affixed my official seal at office in Sedalia, in said county and State, the 28th day of October, A. D. 1870.

[NOTARIAL SEAL.] J. F. TOBIAS,
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this fifth day of November, A. D. one thousand eight hundred and seventy, before me, the subscriber, Oliver P. C. Billings, a commissioner in and for the State of New York, appointed by the governor of the State of Missouri, to take proof and acknowledgements of deeds, mortgages, or any other instruments to be used or recorded in the said State of Missouri, personally appeared Levi Parsons, who is personally known to me to be the identical person whose
71 name is affixed to the foregoing indenture as president, and to be the president of the Missouri, Kansas and Texas Railway Company, a party thereto, and acknowledged that he executed and delivered

the same as the voluntary act and deed of the said Missouri, Kansas and Texas Railway Company for the uses and purposes therein contained.

In testimony whereof I have hereunto set my hand and affixed my official seal in the city of New York, on the day and year above written.

[SEAL.] OLIVER P. C. BILLINGS,
Commissioner of the State of Missouri,
15 *Nassau st., New York.*

OFFICE OF THE TEBO AND NEOSHO RAILROAD COMPANY
Dec. Eight, 1870.

We, Asa C. Marvin, president, and Jonathan R. Barrett, secretary, of the Tebo and Neosho Railroad Company, do hereby certify that the foregoing is a true and correct copy of an original indenture made the eleventh day of October, A. D. 1870, between the said Tebo and Neosho Railroad Company, and the Missouri, Kansas and Texas Railway Company of the State of Kansas for a sale and merger of all the corporate rights, privileges, franchises, and property of the said Tebo and Neosho Railroad Company, to and with the corporate franchises, rights, and prop-
72 erty of the said Missouri, Kansas and Texas Railway Company, and that the said indenture was so made in accordance with a resolution of the stockholders of the said Tebo and Neosho Railroad Company, passed on the eleventh day of October, A. D. 1870, and has been assented to in writing by the holders of a majority of the stock of said company.

Witness our hands and the seal of the Tebo and Neosho Railroad Company, the eighth day of December, A. D. 1870.

TEBO & NEOSHO RAILROAD COMPANY OF MO., SPECIAL CHARTER, 1860.

ASA C. MARVIN,
President of T. & N. R. R. Co.
JONATHAN R. BARRETT,
Secretary Tebo & Neosho R. R. Company.

[5-ct. stamp.]

In presence of—
J. H. SHIELDS.
FRANK S. BOND.

(Endorsed:) Filed January 4, 1871. Eugene F. Weigel, sec'y of State.

Defendant then read in evidence transcript of proceedings in the injunction suit at the relation of the circuit attorney against the justices of the county court of said county, which is as follows, to wit:

STATE OF MISSOURI,
County of Henry, ss:

In circuit court.

Be it remembered that on the 27th day of March, A. D. 1872, there was filed in the office of the clerk of the circuit court of
83 Henry County, in the 22d judicial circuit, State of Missouri, a transcript of record of proceedings had, and of the original papers filed, in a certain cause therein named, in the Henry County court of common pleas, Henry County, Missouri, which said transcript was in the words and figures following, to wit:

STATE OF MISSOURI,
County of Henry, ss :

Be it remembered that on the 7th day of February, A. D. 1872, there was filed in the office of the clerk of the Henry court of common pleas, Henry County, Missouri, a petition and an order of the honorable Wm. L. Avery, judge of said Henry County court of common pleas, made at chambers, in vacation, on the 7th day of February, A. D. 1872, which said petition and order are in the words and figures following, to wit:

Petition.

To the honorable Wm. L. Avery, judge of the Henry County court of common pleas, in and for the county of Henry, State of Missouri.

Your petitioner, The State of Missouri, at the relation of W. N. Pickerell, circuit attorney in and for the 22d judicial circuit of the State of Missouri, would respectfully represent to your honor that the honorable the county court of the county of Henry aforesaid, in said
74 judicial circuit heretofore, to wit, on the fourth day of August, 1870, made and entered of record in said court the following orders, to wit:

"In the matter of the application of the Clinton and Memphis Branch of the Tebo and Neosho Railroad for a subscription to the capital stock of said branch road from the county of Henry to aid in the construction of said branch road.

"The court, after due consideration, being fully satisfied that the resources of the county will be materially enlarged, and that additional and profitable markets will be opened to the people of the county by the *hol*ding of said branch railroad,

"It is considered and adjudged by the court that the County of Henry, in the State of Missouri, do subscribe for and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting in the aggregate to the sum of one hundred and fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the act of the general assembly of the State of Missouri entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, 1868, and in accordance with
75 the resolutions and orders of the board of directors of said Tebo and Neosho Railroad Company establishing said branch railroad and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, the said capital to be paid for by the issue and delivery to the committee appointed to construct said branch road of the coupon-bonds of the county of Henry of the denomination of one thousand dollars each, bearing date the first (1st) day of January, A. D. 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds shall also be payable ten years after the date thereof, the said bonds to be signed by the presiding justice of this court and attested by the clerk of this court, under the seal thereof, and the coupons to be signed by said clerk, the said subscription being made, however, upon the following express conditions, to wit:

"1st. That the said branch railroad shall be located from a point

within or near the corporate limits of the town of Clinton, and thence to the southern limits of the county of Henry, in the general direction of Osceola, in the county of St. Clair, and in the general direction of Memphis, in the State of Tennessee.

"2d. That the proceeds of said bonds shall be applied to and
76 expended in the construction of said branch railroad within the limits of the county of Henry southwardly from Clinton.

"3rd. That none of the bonds aforesaid shall be issued and delivered as aforesaid until graduation and masonry upon that portion of said branch road lying within the limits of Henry County shall have been let to contract to responsible persons and the court shall be reasonably satisfied of the responsibility of such persons.

"4th. That all coupons for interest which shall have matured, or which would have matured had the said bonds been issued and delivered prior to such letting or lettings to contract, shall, upon the delivery of said bonds as aforesaid, be cut off and retained by the county treasurer and destroyed in the presence of this court.

"Ordered, further, that Joseph Hillegas be, and he is hereby, appointed the agent of the county to subscribe the stock aforesaid to aid in the construction of the Clinton and Memphis Branch of the Tebo and Neosho Railroad in accordance with the terms of the foregoing order, and that he cause to be prepared and signed the said coupon-bonds of the county of Henry, and that the same be delivered only in accordance with the foregoing order."

"In the matter of the application of the Clinton and Kansas City
77 Branch of the Tebo and Neosho Railroad for *for* a subscription to the capital stock of said branch railroad to aid in the construction thereof, within the limits of the county of Henry, by and from the said county.

"The court being fully advised in the premises, order and adjudge as follows; that is to say:

"It is ordered and adjudged by the court that the County of Henry, in the State of Missouri, do subscribe for and agree to take five hundred shares of the capital stock of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting in the aggregate to the sum of fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained and the act of the general assembly of the State of Missouri entitled "An act to aid the building of branch railroads in the State of Missouri," approved March 21, A. D. 1868, and in accordance with resolutions and orders of the board of directors of the Tebo and Neosho Railroad Company establishing said branch railroad and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, and that said subscriptions and capital stock be paid for by the issue and delivery to the committee appointed to construct said branch road of the coupon-bonds of the
78 county of Henry of the denomination of one thousand *thousand* dollars each, bearing date the first (1st) day of January, A. D. 1871, and interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds shall also be payable ten years after the date thereof, the said bonds to be signed by the presiding justice of this court and attested by the clerk of this court, under the seal thereof, and the coupons to be signed by the said clerk, the said sub-

scription being made, however, upon the following express terms and conditions, to wit:

"1st. That the said branch railroad shall be located within the county of Henry, from a point within or near the Town of Clinton, and thence in a general northwestern direction, so as to secure to this county a connection by railway with Kansas City, in this State.

"2d. That the proceeds of said bonds shall be applied to and expended in the construction of said branch railroad within the limits of the county of Henry upon the line aforesaid.

"3rd. That none of the said bonds shall be issued and delivered as aforesaid until the means to build the road-bed of said branch railroad and prepare the same for iron has been gathered up and secured to said branch road within the county of Johnson, or within the counties
79 of Cass and Jackson, and the graduation and masonry on the line of the said branch railroad northwestwardly from the county of Henry has been let to contract to responsible persons, and sufficient work has been done thereon to assure its completion to the Henry County line, and the graduation and masonry has also been let to contract to responsible persons, of which the court shall be reasonably satisfied, within the bounds of Henry County.

"4th. That all the coupons for interest which shall have matured, or would have matured had the said bonds been issued and delivered prior to such letting or lettings to contract, shall, upon the delivery of said bonds as aforesaid, be cut off and retained by the county treasurer and destroyed in the presence of the .

"Ordered, further, that Joseph Hillegas be, and he is hereby, appointed the agent of the county to subscribe the stock aforesaid to aid in the construction of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, in accordance with the items of the foregoing order, and that he cause to be prepared and signed the coupon-bonds of the county of Henry, and that the same be delivered only in accordance with the foregoing order."

Your petitioner states that only two of the judges of said court concurred in said order, and that the other judge, Jared Stephenson,
80 made and entered upon record of said court his protest against said order.

That afterwards, to wit, on the seventh (7th) day of November, 1870, the said court made and had entered of record the following order for the issue of the bonds contemplated in said orders, to wit, (Jennings and Hillegas present, Stephenson not sitting:)

"In the matter of the subscription of Henry County to the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company.

"Whereas the county court of said county, at the August term, 1870, of said court, made an order in behalf of said county agreeing to take one thousand five hundred shares of the denomination of one hundred each, and amounting in the aggregate to hundred and fifty thousand dollars, of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, under and by virtue of the authority in said order recited; and whereas Joseph Hillegas was appointed by said court in said order the agent of said county to subscribe the stock aforesaid; and whereas said Hillegas, as said agent, in pursuance of said order, did subscribe for and take, in behalf of said county, the one thousand five hundred shares of the cap-

81 ital stock of said branch railway company aforesaid; whereas said capital stock by said was made payable by the issue and delivery to the committee appointed to construct said branch railroad, of the coupon-bonds of the county of Henry, of the denomination of one thousand dollars each, to bear date January 1st, 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, principal to be paid at the expiration of ten years after the date thereof; and whereas said branch railroad has on its part complied with all the conditions precedent to the delivery of said bonds as set forth in said order:

"Now, therefore, it is considered by the court that said bonds be signed by the presiding justice of this court and attested by the clerk of this court, under the seal thereof, and the coupons signed by said clerk as directed in said order, and that said bonds, numbered from No. 1 to No. 150, inclusive, of the denomination of one thousand dollars each, and amounting in the aggregate to one hundred and fifty thousand dollars, signed and sealed as aforesaid, be delivered to the chairman of the committee of construction of said branch railroad, and that the clerk of this court take his receipt therefor."

Your petitioner alleges that said orders and subscriptions, so made as aforesaid, were and are unauthorized by and contrary to law; that

82 the said county court was not authorized to make such subscription without the consent thereto of two-thirds of the qualified voters of said county, given at either a general or special election in said county; and your petitioner alleges that no such election was in fact held or vote given, as required by the constitution and laws of the State of Missouri; that two- ($\frac{2}{3}$) thirds of the qualified voters of the said county never gave their consent thereto, at either a general or special election.

And your petitioner further represents that the so-called branch roads in said orders mentioned never were, and in fact are not, branch roads of the said Tebo and Neosho Railroad Company, and said subscriptions were not made by virtue of the authority in the charter of said company, but your petitioner avers that said subscription was fraudulently made by said court in the interest of a few persons seeking their own aggrandizement; nor was such subscription in fact made to the capital stock of said Tebo and Neosho Railroad Company; nor was the same made at its solicitation; nor has said company ever recognized, ratified, or accepted said subscription; nor is it bound to issue, and, as this petitioner is informed, and so charges the fact to be, it will not issue any certificate of stock to said county for and on account of such subscription.

83 Your petitioner charges the fact to be, that on or about the month of June, 1870, a number of persons, citizens of said Henry County, combined together for the purpose of private enterprise, adventure, and speculation, to obtain from various counties on the line of what was then and is now commonly known as the Kansas City and Memphis Railroad, an unchartered and unorganized road projected through the counties of Jackson, Cass, and Henry, running southeastwardly. That said persons, well knowing they could not obtain a two-thirds vote of the qualified voters of said Henry County requesting and authorizing said county court to make said subscription, as by the constitution required, in order to evade said provisions of the constitution, in section 14 of article 11 thereof, and at the same time secure the subscription to a road in fact wholly independent of the said Tebo and Neosho Railroad, and wholly under the control and for the private benefit of

said persons, fraudulently and cunningly applied to the then directors of the said Tebo and Neosho Railroad Company to permit them to call these enterprises branch roads of the said Tebo and Neosho Railroad Company, and obtained their consent thereto with the distinct understanding that the said branch roads were to be organized pursuant to the provisions of an act of the general assembly of the State of
84 Missouri entitled "An act to aid the building of branch railroads in the State of Missouri," approved March 21, 1868, and with the further understanding and agreement that the said so-called branch roads were to be entirely separate from and independent of said company, and said company was to be in nowise responsible for any of the acts, liabilities, and dealings of such branches, and said subscriptions were so made.

Petitioner alleges that the evident and real purpose of calling said enterprise and scheme branch roads, as aforesaid, as well as the real intent and purpose of said act of the legislature last aforesaid, was to bring this said adventure under the liberal provisions of the charter of the Tebo and Neosho Railroad Company, so as to enable them, under color of said charter, to obtain subscriptions from the county courts without submitting the matter to the qualified voters of said county as to whether such subscriptions should be made.

Your petitioner further alleges that after said persons had so obtained the consent of said Tebo and Neosho Railway Company to call said roads branch roads of said company, and prior to the making of the order hereinbefore copied issuing said bonds, the said Tebo and Neosho Railroad Company, as in such cases by statute made and provided, and pursuant to law, by articles of agreement and sale, did sell and
85 transfer all its rights and franchises and property to the Missouri, Kansas and Texas Railway Company, a corporation organized and existing under the laws of the State of Kansas; that prior to said order last aforesaid, the said sale and transfer was duly accepted and ratified by said Missouri, Kansas and Texas Railway Company, and the said sale and transfer and ratification duly filed and recorded in the office of the secretary of state for the State of Missouri. And your petitioner avers that thereafter the said Tebo and Neosho Railroad Company was merged into the said Missouri, Kansas and Texas Railway Company, and said Tebo and Neosho Railroad ceased to exist as such, and the authority, if any, of said persons claiming to act for and in behalf of said Tebo and Neosho Railroad Company in furthering the objects of said branch roads, as well as of said county court to issue its bonds thereto, was revoked and annulled, notwithstanding, as petitioner alleges, after the acts of sale, ratification, and filing for record and recording as aforesaid, the said court did make said order issuing said bonds, although the said Missouri, Kansas and Texas Railway Company did not solicit the same to be done, nor has it ever, directly or indirectly, recognized said subscription, but, on the contrary, wholly dis-
86 claims and repudiates the same and said bonds, nor has it ought to do with said branch roads, nor do said branch roads have anything to do with said Missouri, Kansas and Texas Railway Company, neither being under or subject to its control, but has ever and yet acts wholly independent of it; that said Missouri, Kansas and Texas Railway *Company*, as was the said Tebo and Neosho Railroad *Company* is a broad-*guage* road, whereas the said persons who are controlling and managing said branch roads are constructing the same as a narrow-*guage* road, without any authority or consent of either the county or said company.

And your petitioner alleges, as further proof of the fact, that said branch roads, so called, were inaugurated, and have been and are entirely independent of said Tebo and Neosho Railroad Company, as well as the said Missouri, Kansas and Texas Railway Company, the said persons so managing said branch roads, through one Dewitt C. Stone, claiming to be the president of such branches, and one R. C. McBerth, claiming to be the secretary pro tem. thereof, did, on or about the month of August, 1871, sell and transfer said branches, by and with the consent of said county court, to what has heretofore been known as the Kansas City and Memphis Railroad, as hereinbefore stated, but
87 what is in said sale designated as the Kansas City, Memphis and Mobile Railroad Company, an unchartered and unorganized road, and wholly independent of the said Missouri, Kansas and Texas Railway Company, and without the knowledge or consent of said Missouri, Kansas and Texas Railway Company.

And your petitioner further avers that, notwithstanding the conditions on which said subscriptions were made, the said conditions were not and never have been complied with by said so-called branch roads, yet said county court, fraudulently and corruptly combining and confederating with said persons, for adventure and speculation, have, nevertheless, since the date of said order, sale, transfer, issued and delivered to said persons, the said bonds designated and called for in the subscriptions and order aforesaid, and that said persons either have them in custody, or are hawking them about in the markets, or squandering them for their own private use and benefit; that said branch road or roads are not being constructed, and never will be with said money; that the said persons who received said bonds were not required by said county to give, and did not give, any bond for the faithful and proper application of said bonds or their proceeds, nor are said persons sufficiently solvent to respond in damages for any loss consequent upon their misappli-
88 cation of said bonds.

And your petitioner further represents and alleges that said bonds, so issued as aforesaid, are made by said subscriptions and on their face to bear interest from their date, to wit, on the 1st day of January, 1871, at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, whereas by statute and the law in force governing such cases and bonds they should not have borne, and could not bear, over seven per centum interest per annum.

And your petitioner therefore alleges that said bonds, if not void on this account, are void as to the interest thereon in excess of said seven per cent.

Your petitionr further alleges that, in pursuance and furtherance of said fraudulent purpose and scheme, the said county court has ordered and made an assessment upon all the taxable property of the citizens of said Henry County, to meet the interest at ten per cent. which has accrued upon said bonds since the 1st day of January, 1871; that said assessment has been made, and the sheriff of Henry County, to wit, one John Curtis, is now proceeding to collect the same, and is threatening and about to levy upon and seize the property of the citizens of said county of Henry to pay off said ten per cent. interest and assessment, and unless he be restrained and enjoined by the interposition and
89 order of your honor, in the exercise of your equity jurisdiction, the said sheriff will at once proceed to levy upon and seize and sell the property of all the citizens of said county to pay said tax so

fraudulently and illegally assessed and imposed, or return their real estate as delinquent.

And your petitioner avers and complains that the said citizens have no adequate remedy and protection at law against the threatened wrong and injury; that the threatened injury would be irreparable; that to protect each citizen of the said county against the same would necessitate a suit by each one them in a population of 20,000 against the said sheriff and his securities in all cases when he should seize personal property, thus involving each citizen tax-payer in litigation and to costs for attorneys' fees, that could not be recovered against said sheriff in an action of de bonis asportatis, or for damages, and that a cloud would be cast upon the real estate of such citizens as should be returned and sued as delinquent, and thus the citizens of the said county, in the necessary defense and protection of their property, would from year to year, to their great har'assment and injury, for the next ten years be subjected to, and the courts of the county, to the great detriment of other litigation, be filled with suits, thus greatly depreciating in value their property and crippling the industries and growth of the whole country.

90 Your petitioner alleges that Joseph Hillegas, Jared Stephenson, and William Munson are the acting justices of the county court of said county, and your petitioner alleges that said justices threaten and intend to make other and additional assessments on the taxable property of said county to meet the payment of each installment of interest on said bonds as the same matures.

In view of the premises, your petitioner prays that a temporary writ of injunction be issued by your honor, enjoining and restraining said sheriff and his deputies and successors in office from any levy or sale, or other and further act toward the collection of said tax, or such as may be hereafter imposed for or on account of said bonds and the interest to accrue thereon, and also enjoining and restraining said county justices and their successors in office from making any other or further assessment on account of said bonds or any interest to accrue thereon, and from doing any other or further act whatever looking to the enforcement of the payment or liquidation or funding of said bonded debt and interest, and that on the final hearing of this cause the said injunction be made perpetual, and for all proper relief.

W. N. PICKERELL,
Circuit Attorney for the 22d Judicial Circuit.
PHILLIP & VESTS,
91 *Attys. for Petitioner.*

Which said petition is endorsed on the back in writing in words and figures following:

St. of Mo., ex rel. cir. atty., *vs.* Sheriff and Co. Justices of Henry Co., Mo. Filed in chambers Jan. 11. Wm. L. Avery, judge. Filed Feb'y 7, 1872. Jno. A. Driggs, clerk.

Filed with which petition is the following order, to wit:

IN THE MATTER OF THE STATE OF MISSOURI, at the relation of William N. Pickerell, circuit attorney for the 22d judicial circuit for the State of Missouri,

against

JOHN CURTIS, SHERIFF OF THE COUNTY OF Henry, and State of Missouri, and Joseph Hillegas, Jared Stephenson, and William Munson, justices of the county court of Henry County, State of Missouri.

Before William L. Avery, judge of the Henry County court of common pleas, at chambers, in vacation.

Now on this day comes the said plaintiff, and presents to the judge aforesaid its petition, praying for an injunction against the said defendants; and it appearing to the court the said defendants have been
92 duly notified at least five days before the presenting of this application, as by law in such cases provided, and the said defendants, John Curtis, William Munson, Jared Stephenson, and Joseph Hillegas appearing by their attorney, and the said petition being seen and heard by the said judge, the court doth find therefrom that the said county court heretofore, to wit, on the 4th day of August, A. D. 1870, by its order made of record, did subscribe to the capital stock of the so-called "Clinton and Memphis Branch of the Tebo and Neosho Railroad Company," in the name of the said county, to aid in the construction of said branch road, one thousand and five hundred shares, each share being of the denomination of one hundred dollars, amounting in the aggregate to the sum of one hundred and fifty thousand dollars; and did also at the same time, by its order of record, subscribe for, and agree to take, five hundred shares of the so-called "Clinton and Kansas City Branch of the Tebo and Neosho Railroad Company," each share being of the denomination of one hundred dollars, amounting in the aggregate to the sum of fifty thousand dollars; and that afterwards said court, by its order, did direct and cause to be issued the coupon-bonds of said county of the denomination of one thousand dollars each, bearing date 1st day of January, A. D. 1870, and
93 interest at the rate of ten per cent. per annum, payable semi-annually, at the National Park Bank, in the city of New York, at which place the principal of said bonds will be payable ten years after the date thereof; that said subscription and orders were made contrary to law, and without the consent of two-thirds of the qualified voters of said county, and that said so-called branch roads, as appears by said petition, were not, and are not in fact, branch roads of said Tebo and Neosho Railroad, and that said so-called branch roads had no corporate existence as such, and that said subscriptions were fraudulently obtained, and that the interest which said bonds bear on their face is unlawful, and that the said principal and interest, as appears from said petition, will be misappropriated and squandered by irresponsible parties, not representing the said Tebo and Neosho Railroad Company; that the said Tebo and Neosho Railroad Company, before the issuing of said bonds, with all its franchises and property was, pursuant to law, sold and transferred to another corporation, known as the Missouri, Kansas and Texas Railway Company, in the State of Kansas; that said Tebo

and Neosho Railroad thenceforth ceased to exist as such; that
94 said Missouri, Kansas and Texas Railway Company has neither recognized or accepted said subscription and bonds, or aught to do with them, nor is it responsible for any of the acts, doings, or liabilities of the said so-called branch roads; and it further appearing from petition that the said county has not received, and will not receive, from either the said Tebo and Neosho Railroad or the said Missouri, Kansas and Texas Railway Company any certificate of stock for the subscription and the bonds so issued as aforesaid, but that the same will be a loss entire to said county, and that the said county court, through its said justices, has ordered and caused to be made an assessment on the taxable property of all the citizens of said county and property-holders thereof, to pay off the accrued interest on said bonds, at the rate of ten per cent., payable semi-annually; and that the sheriff of said , combining and colluding with said county justices, fraudulently and oppressively and wrongfully, to exact and extort from the said tax-payers the said interest aforesaid, is threatening and about to seize and levy upon the property of said citizens and tax-payers and sell the same, and to return their real estate of said parties as delinquent, in order to enforce the collection of said interest on said bonds, and from year to year, as
95 said interest matures, to continue to make said assessments, levy, and collection, and also to enforce the collection of the principal of said bonds; and it appearing from said petition that the said citizens have no adequate remedy at law to prevent the threatened injury, that the same if permitted would be irreparable, and that an attempt on the part of said citizens and tax-payers to repair such injury by proceedings at law would result in an endless multiplicity of suits, to the great detriment of the people and to the administration of justice in said county:

It is, therefore and hereby, ordered and decreed by the judge aforesaid that this writ of temporary injunction issue to and against said defendant, enjoining and restraining said sheriff, his deputies and successors in office, from any levy or sale or other and further act towards the collection of said tax, or such as may be hereafter imposed on account of said bonds, and the interest to accrue thereon; and also enjoining and restraining the said county justices and their successors in office from making any other and further assessment on account of said bonds, or any interest to accrue thereon, and from doing any other or further act whatever looking to the enforcement of the payment, liquidation,
96 or funding of said bonded debt or interest, and that said defendants be and appear before the Henry County court of common pleas, in and for the county aforesaid, on the first day of the next March term thereof, to be begun and holden at the court-house, in the town of Clinton, on the 2d Monday in March, A. D. 1872, to show cause, if any they have, why the said injunction shall not be made perpetual, when and where this temporary writ is made returnable.

As witness my hand, at chambers aforesaid, this 7th day of February, A. D. 1872.

WM. L. AVERY, [SEAL.]
Judge of the Henry County Court of Common Pleas.

Copy of petition and affidavit of defendants for a change of venue.

In the Henry County court of common pleas, Henry County, State of Missouri.

THE STATE OF MISSOURI, AT THE RELATION of William N. Pickerell, circuit attorney in and for the twenty-second judicial circuit of the State of Missouri, petitioner, plaintiff,
against
JOHN CURTIS, SHERIFF OF THE COUNTY OF Henry, and his deputies and successors,
97 and Joseph Hillegas, William Munson, and Jared Stephenson, justices of the county court of the county of Henry, in the State of Missouri, and their successors in office.

To the honorable William L. Avery, judge of the Henry County court of common pleas above named:

Your petitioners, the above-named defendants, respectfully represent unto your honor that they desire a change of venue in the above cause, for the following reasons, to wit: That the Hon. William L. Avery, judge of said court, is interested and prejudiced in favor of plaintiff in the above-entitled cause, and is also related to a large number of people residing in Henry County, on whose behalf this suit purports to be brought, and that the party plaintiff has an undue influence over the mind of the judge of said court with regard to the matters involved in this action. Wherefore defendants ask that the venue in this cause be changed to some court and sent before some judge where the causes complained of do not exist; and your petitioners will ever pray.

JOHN CURTIS ET AL.,
Defendants.
R. C. McBETH,
J. LA DUE, *Defts.' Attys.*

98 STATE OF MISSOURI,
County of Henry, ss:

John Curtis, one of the above-named defendants, makes oath and says he has read the foregoing petition, and knows the contents, and that the same is true to the best of his knowledge and belief. Deponent further says that he has just cause to believe that defendants cannot have a fair hearing or trial of this cause before said judge of said court, on account of the causes above alleged.

JOHN CURTIS, *Sheriff.*

Subscribed and sworn to before me this 10th day of January, A. D. 1872.

JNO. A. DRIGGS, *Clk.*

And afterwards, to wit, at the March term, A. D. 1872, of the Henry County court of common pleas, Henry County *County*, Missouri, begun and held at the court house, in the town of Clinton, in said Henry County, on the second Monday in March, and on the 15th day of March, A. D. 1872, it being the 5th day of the said March term, 1872, of said court, before honorable Wm. L. Avery, judge of said court, the following among other proceedings were had, to wit:

THE STATE OF MISSOURI, EX REL. WM. N. Pickerell, circuit attorney, plaintiff,
against
99 JOHN CURTIS, SHERIFF OF HENRY COUNTY, and Joseph Hillegas, Jared Stephenson, and William Munson, justices of the county court of Henry County, Mo., defendants.

Now at this day come the parties aforesaid, and thereupon the petition for a change of venue, coming on to be heard, and being seen, heard, and understood by the court, it is by the court ordered that this cause be transferred to the circuit court of Henry County.

It is therefore ordered that the clerk of this court make out and certify to the clerk of the circuit court of Henry County, Missouri, without unnecessary delay, a full, true, and complete transcript of the record of the proceedings had in this cause, and of the pleadings and original papers filed herein not forming part of the record.

STATE OF MISSOURI,
County of Henry, ss:

I, John A. Driggs, clerk of the Henry County court of common pleas, Henry County, Missouri, hereby certify that the foregoing contains a full, true, and complete transcript of the record and proceedings had in the cause therein named, together with all the original papers filed in the cause and not forming a part of the record, as fully as the same remain of record and on file in my office.

100 Witness my hand as clerk of said court, and the seal thereof hereto affixed, at office in Clinton, this 27th day of March, A. D. 1872.

[L. S.] JNO. A. DRIGGS, *Clerk*,
By SAML. B. ORENE, *Deputy*.

And afterwards, to wit, at the August term, 1872, of the circuit court of Henry County, Missouri, begun and held at the court-house, in the town of Clinton, on the ninth Monday after the second Monday in June, 1872, the following among other proceedings were had, and made part of record, to wit:

IN THE MATTER OF THE STATE OF MISSOURI, at the relation of William N. Pickerell, circuit attorney for the 22d judicial circuit for the State of Missouri,
against
JOHN CURTIS, SHERIFF OF THE COUNTY OF Henry, State of Missouri, and Joseph Hillegas, Jared Stephenson, and William Munson, justices of the county court of Henry County, State of Missouri.

Now on this day comes the said plaintiff, and this cause coming on for final hearing, and it appearing to the satisfaction of the court that the defendants, nor either of them, have filed any answer herein,

101 either in the Henry County court of common pleas, from wherein this cause was brought by change of venue, nor in this court, nor have they, or either of them, filed in said common pleas court, or in this court, a motion to dissolve the temporary injunction heretofore granted

in this cause by the judge of said court of common pleas, in vacation, and this cause coming on for final hearing, and the defendants failing to appear herein, the same is taken up and submitted to the court, and the court doth find the facts to be, that the county court of Henry County, Missouri, of which the defendants, William Munson, Joseph Hillegas, and Jared Stephenson are acting justices, did on the 4th day of August, 1870, by its order, subscribe to the capital stock of what was in said order denominated "The Clinton and Memphis Branch of the Tebo and Neosho Railroad Company," in the name of the said county, to aid in the construction of said so-called branch road, one thousand five hundred shares, each share being of the denomination of one hundred dollars, amounting in the aggregate to the sum of one hundred and fifty thousand dollars, and did also at the same time, by its order, subscribe for and agree to take five hundred shares of the capital stock of what is denominated in said order as the Clinton and Kansas City Branch of the Tebo and Neosho Railroad Company, each share being of the denomination of one hundred dollars, amounting in the aggregate to the sum of fifty thousand dollars; that afterwards
102 said court, by its order, did direct and cause to be issued the coupon-bonds of said county, of the denomination of one thousand dollars each, bearing date the 1st day of January, 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the city of New York, at which place the principal of said bonds will be payable ten years after the date thereof.

The court doth further find that said subscriptions and orders were made contrary to law, and without the consent of two-thirds of the qualified voters of said county thereto obtained, as by the constitution and laws of the State of Missouri in such case made and provided.

And the court doth further find that said so-called branch roads were and are not in fact branch roads of said Tebo and Neosho Railroad, and that they have no corporate existence as such, and that said subscriptions were fraudulently obtained, and that the interest that said bonds are made to bear on their face is unlawful and in excess of the rate of interest authorized by law. That said subscriptions were never solicited or obtained by said Tebo and Neosho Railroad Company, nor has the same been accepted or ratified by said company. That said so-called branch roads were and are in fact independent of and separate from said Tebo and Neosho Railroad Company. That the said Tebo
103 and Neosho Railroad Company, prior to the issuing of said bonds, was, with all its franchises and property and rights south of the Pacific Railroad Company, sold and transferred and merged into another corporation, known as the Missouri, Kansas and Texas Railway Company; that said Tebo and Neosho Railroad Company thenceforth, south of the line of said Pacific Railroad Company passed, with the entire management and control, *of* the said Missouri, Kansas and Texas Railway Company, which has in no manner ever solicited, recognized, or accepted such subscription or bonds, nor has it ought to do with, or is it responsible for, any of the acts, doings, or liabilities of said branch roads, nor has said county ever received from the said Tebo and Neosho Railroad Company or the said Missouri, Kansas and Texas Railway Company any certificate of stock for said subscriptions or bonds so made and issued as aforesaid, nor are said companies, or either of them, under obligations so to do.

And the court doth further find that said county court, through its said justices, has ordered and caused to be made an assessment on the taxable property of all the citizens of said county and property-holders

therein, to pay off the accrued interest on said bonds, and threatens to so continue to do, to meet the accrued and accruing interest on
104 said bonds, semi-annually, at the rate of ten per centum per annum, and that the said sheriff of said county, combining with said county justices to exact from said tax-payers the interest aforesaid, threatens to levy upon and seize the property of said tax-payers, and sell the same, and to return their real estate as delinquent, in order to enforce the collection of said interest on said bonds, from year to year, as the same shall accrue; and the said county court likewise threatens to enforce the payment of the principal of said bonds; and the court, being satisfied that the said assessment and collections, if permitted, would be oppressive and injurious to the whole people of said county and to the State, and that the said citizens and tax-payers have no adequate remedy at law to prevent the threatened injury, and that the same would be irreparable; that on their part, to prevent or repair such injury by proceedings at law, would result in a multiplicity of suits to the great har'assment of the people, and of detriment to the administration of justice in said county.

It is therefore considered, adjudged, and decreed by the court that the temporary injunction herein be, and the same is hereby, made perpetual, forever enjoining and restraining said sheriff, his deputies and successors in office, from any levy or sale, or other and further
105 act towards the collections of said tax, or such as may be hereafter imposed on account of said bonds, or the interest thereon; and also forever enjoining and restraining the said county justices, and their successors in office, from making any other or further assessment on account of said bonds, or any interest thereon, and from doing any other or further act whatever looking to the enforcement of the payment, liquidation, or funding of said bonded debt, or interest, and that plaintiff recover of the defendants costs of this suit, and that execution issue therefor.

STATE OF MISSOURI,
County of Henry, ss:

I, John A. Driggs, clerk of the circuit court within and for the county of Henry, State of Missouri, do hereby certify that the foregoing pages contain a full, true, and complete transcript of the record and proceedings in the cause therein named as fully as the same are and remain of record in my office.

In testimony whereof I hereto set my hand as clerk of said court, and affixed the seal thereof, at office in Clinton, this 13th day of November, A. D. 1872.

[SEAL.]

J. A. DRIGGS, *Clerk*,
By S. B. ORENE, *Deputy*.

Defendant then offered as a witness, HARVEY W. SALMON, who
106 testified that he is treasurer of the State of Missouri; that in 1871 he lived at Clinton, Mo., and was a member of the firm of Salman and Stone, brokers & bankers of that place, the said Stone being the D. C. Stone who was then president of the Clinton and Memphis and Clinton and Kansas City Branch of the Tebo and Neosho Railroad Company; that about the 20th of January, 1871, he went to New York City to negotiate for said branch railroad the bonds in question, which were held by said Stone; that he then met in New York the plaintiff, who was a broker, who he proposed to to negotiate said bonds for him; that he showed to the plaintiff the orders of the county court of Henry County

aforesaid and of St. Clair County, making the subscriptions to said branch roads; that plaintiff examined them, and said before he would deal with the bonds he wanted a lawyer to investigate the regularity of the issue of the bonds by said counties. He told me he had solicited Judge F. P. Wright, of Sedalia, Mo., to do this for him. I afterwards saw in his office the manuscript of said Wright's opinion to him. He, plaintiff, had this opinion printed. The paper marked "Exhibit A," and filed with the deposition of said Wright herein, is the same plaintiff had printed. The pamphlet, Exhibit B, filed with said deposition, I
107 also saw the plaintiff have. (Said exhibits are herewith filed, and, by consent of plaintiff's and defendant's attorneys, are to be attached to the transcript herein without transcribing them.)

Witness states that he had not at this time sold plaintiff any of the bonds; had perhaps let him have one as a sample.

On cross-examination,

Witness stated that he sold plaintiff some of said bonds at 82½ cents; sold him $171,000. He did not know who paid Judge Wright for his opinion; supposes it was paid by Stone out of the proceeds of bonds. In August, 1871, he made the contract with plaintiff for the sale of the balance of the bonds to him. I sold him some prior to August, 1871. Plaintiff was to take 30 of them per month. The last were delivered to him in May, 1872. Witness states he did not see the protest of Judge Stephenson. It was not in the county court record he had, or that plaintiff saw.

Defendant then read the following deposition of said F. P. WRIGHT, to wit:

Depositions of witnesses produced, sworn, and examined at the law-office of Parks and Gantt, in the town of Clinton, county of Henry, and State of Missouri, by consent of the parties, on the 18th day of April, A. D. 1874, between the hours of eight o'clock in the fore-
108 noon and six o'clock in the afternoon of that day, in a certain now pending in the circuit court of the United States for the western district of Missouri, wherein Albert H. Nicolay is plaintiff, and the County of Henry is defendant. Dryden & Dryden, attys. for plff. Phillips & Vest, attys. for deft.

FOSTER P. WRIGHT, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

My residence is Clinton, Henry County, Missouri.

About the first of February, 1871, I was living in Sedalia, Pettis County, Mo. I received a letter from Dewitt C. Stone requesting me to come to Clinton, for the purpose of giving an opinion in regard to the validity of certain bonds issued by the counties of Henry and St. Clair, in aid of the Clinton and Memphis Branches of the Tebo and Neosho Railroad. I was at that time an attorney-at-law, practicing at Sedalia, Mo. I came up to Clinton the next day. Mr. Stone handed me a letter from Mr. Nicolay, of New York, requesting my opinion in regard to the validity of these bonds. I don't remember the contents of the
109 letter—that was the purport of it—requesting my opinion of the validity of the bonds, as stated in the first paragraph of opinion I gave to Mr. Nicolay in reply to said letter. I do not know what became of the letter. I think I took it home, for the reason that my wife saw the letter. We have both looked for it, but could not find it.

Paper marked "Exhibit A" shown witness, which witness states is a correct copy of the answer furnished by him to said letter.

Paper marked "Exhibit B" shown witness.

Question. Please state whether this paper, Exhibit B, is the opinion furnished to the president of the said company referred to in Exhibit A, as forwarded by you to the plaintiff?

Answer. It is.

Question. State whether or not at the time you furnished the plaintiff the opinion, Exhibit A, and during the preparation of it, you made an examination of the said subscriptions of said counties and the records of said company pertaining to the same.

(Objected to as irrelevant.)

Answer. For the purpose of obtaining information, I went to the office of A. La Due, then attorney of the Tebo and Neosho Railroad Company, and there wrote the opinion. He had there what he represented to be the books of the company and copies of the orders of subscrip-
110 tions made by said counties subscribing said stock, to the best of my recollection, and he gave access to the books and subscriptions, and aided me in examining them. I supposed the main thing was to ascertain the validity of these subscriptions in view of the new constitution, when there had been no election by the people authorizing the making of such subscriptions. I gave my chief attention to that.

Cross-examination:

The letter handed me by Mr. Stone from plaintiff was addressed to me on the inside of the letter. I don't recollect about the envelope. I had never known the plaintiff. I never had any correspondence with him before this. I don't know whether I ever heard of him before. I was not acquainted with his handwriting. I don't know that this letter was written by him. I don't think I have seen the letter since February, 1871, the time I wrote the opinion. I have moved about to different places since that time, and some of my papers have got mislaid. Mr. D. C. Stone, in February, 1871, was a banker in Clinton, a member of the firm of Salman & Stone.

Mr. A. D. La Due also, at that time, lived in Clinton and had his office here. I wrote the opinion here in Clinton, and think when it was written, I handed it to Mr. Stone to mail to Mr. Nicolay. I was paid one hundred dollars; Mr. Stone either paid it to me or gave me
111 credit for it in the bank on my account.

Question. Then you did not get your fee from Nicolay?

Answer. I only got it as I have stated. Stone asked me what my fee was, and I got it as stated, and that was the only fee I got. I don't recollect the contents of the letter, but I am pretty certain it was addressed to me inside. I don't know where Nicolay got my name; my impression is the letter was handed me after it had been opened. The reason I handed the opinion to Mr. Stone to mail was because he had written me to come to Clinton to write it, and I just wrote the opinion and handed it to him to mail. The reason I came here was to have access to the books and records.

FOSTER P. WRIGHT.

(The printed Exhibits A and B are herewith attached to this transcript, as per agreement of said parties.)

The plaintiff objected to said deposition as incompetent and inadmissable, but the objection was overruled.

This was all the evidence.

112 Thereupon the plaintiff demurred to the evidence of defendant

as insufficient to establish any defence to the plaintiff's action, which demurrer the court sustained, and directed the jury to return a verdict for the plaintiff.

To which action of the court in sustaining said demurrer and excluding the defendant's evidence and directing the jury to return a verdict for the plaintiff, the defendant then and there objected and excepted.

Thereupon the jury returned the following verdict, to wit:

"We, the *the* jury, find for the plaintiff, and assess his damages at the sum of nineteen thousand six hundred and forty-eight dollars and for'-six cents.

"JOHN S. McFARLAND,
"*Foreman.*"

And the court ordered and had entered up the following judgment, to wit:

ALBERT H. NICOLAY
vs.
THE COUNTY OF HENRY.

Now come the parties, by their respective attorneys, the plaintiff by Grant & Smith, and the defendant by Phillips and Vest, and thereupon come a jury, to wit, Wm. A. Curry, John F. Ellis, B. F. Gibson, Samuel T. Harrison, Charles Karnes, John S. McFarland, M. L. Laughlin,
113 John S. Miller, Albert Newman, Chas. L. Wells, Shadrick Dickens, and Isaac Dwight, twelve good and lawful men, duly empannelled and sworn well and truly to try the issues joined between the parties, upon their oaths do say:

"We, the jury, find for the plaintiff, and assess his damages at the sum of nineteen thousand six hundred and forty-eight dollars and forty-six cents.

"JOHN S. McFARLAND,
"*Foreman.*"

It is therefore considered, ordered, and adjudged by the court that the plaintiff do recover of said defendant the sum of nineteen thousand six hundred and forty-eight dollars and forty-six cents, the damages by the jurors aforesaid assessed, and also his costs and charges in this behalf laid out and expended, and have thereof execution.

And afterwards, to wit, on the 23d day of April, 1874, it being the fourth day of said term, the defendant filed the following motion to set aside the said verdict and grant a new trial, to wit:

In the circuit court of the United States for the western district of Missouri.

ALBERT H. NICOLAY, PLAINTIFF,
vs.
THE COUNTY OF HENRY, DEFENDANT.

Now on this day comes the defendant and moves the court to set aside the verdict herein and grant a new trial, for the following reasons:
114 I. Because the court erred in sustaining the demurrer of plaintiff to the defendant's evidence.

II. Because the court erred in directing the jury to find a verdict for the plaintiff.

III. Because the verdict is wholly contrary to the law and against the evidence, and, under the law and the evidence, should have been for the defendant.

PHILLIPS & VEST,
Attys. for Deft.

And afterwards, to wit, on the 5th day of April, 1874, it being the sixth day of said term, said motion coming on for hearing, the same was taken up and submitted to the court; which motion, after being seen by the court, was then and there overruled.

To which action of the court in overruling said motion the defendant then and there duly excepted.

Thereupon the defendant filed the following motion in arrest of judgment, to wit:

In the circuit court of the United States for the western district of Missouri.

ALBERT H. NICOLAY, PLAINTIFF,
against
115 THE COUNTY OF HENRY, DEFENDANT.

Now on this day comes the defendant and moves the court to arrest the judgment herein, for the following reasons:

I. Because the petition does not state facts sufficient to constitute a cause of action.

II. Because it does not appear from the petition that the county court had any authority or power to issue the alleged bonds upon which plaintiff's action is founded, nor does it appear therefrom by what authority or law the said bonds were issued.

PHILLIPS & VEST,
Attys. for Deft.

Which said motion was then and there taken up, and, being seen by the court, was by the court overruled.

To which action of the court the defendant then and there excepted.

And the defendant now here tenders his bill of exceptions, and prays that the same may be signed and sealed and made of record herein; which is accordingly done.

JOHN F. DILLON, [SEAL.]
Judge of the Circuit Court of the United States for the Western District of Missouri.

116 And endorsed on said bill of exceptions is the following stipulation, to wit:

It is hereby agreed and stipulated by and between the plaintiff and defendant in the foregoing cause of Albert H. Nicolay against Henry County that the clerk of said circuit court shall, in making up the transcript of the record therein, make a transcript of the first count of the petition, and no more. The other counts in the petition are like the first count, but upon other coupons of the same class of bonds, and in the aggregate amount to the sum specified in the verdict of the jury.

This 25th day of April, 1874.

JAMES GRANT,
For Plff.
PHILLIPS & VEST,
For Deft.

And afterwards, to wit, on the 13th day of May, 1874, the said defendant, by its attorneys, filed the follow' bond, to wit:

Circuit court of the United States for the western district of Missouri.

ALBERT H. NICOLAY
vs.
THE COUNTY OF HENRY.

Know all men by these presents, that the County of Henry, by William R. Taylor, presiding justice of the county court of said county, and G. W. Walker, Benjamin Barker, Joseph Sharp, J. H. McCann, W. N. West, Noah Edwards, Levi J. Colvin, John W. Comer, J. Dunaway, G. W. Hampton, Isaac Adair, M. R. Gillett, A. R. Chitwood, J. M. McIntire, James Parks, James B. Gantt, H. F. Hiser, A. Ross, Pleasant Walker, T. J. Adamson, G. W. S. Walker, James H. Bass, David T. Hampton, A. C. Avery, L. P. Beatty, James Freeman, J. B. Swendel, Wm. M. Doyle, John C. Gilliam, Thos. F. Hull, J. F. Green, David S. Crisman, B. C. Fewil, Bird D. Parks, Henry Devenny, of Henry County, Missouri, are held and firmly bound unto Albert H. Nicolay, of the city of New York, and State of New York, in the sum of twenty-five thousand dollars to paid to the said Albert H. Nicolay, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this day of April, A. D. 1874.

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Whereas the above-named County of Henry hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the case of Albert H. Nicolay, plaintiff, against the county of Henry, aforesaid, defendant, by the circuit court of the United States for the western district of Missouri:

Now, therefore, the conditions of this obligation are such, that if the above-named County of Henry shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

118

COUNTY OF HENRY,
By WM. R. TAYLOR,
Presiding Justice of the County Court, and Agent for said County. [SEAL.]

G. W. WALKER.	[SEAL.]	BENJAMIN BARKER.	[SEAL.]
JOSEPH SHARP.	[SEAL.]	J. H. MCCANN.	[SEAL.]
W. N. WEST.	[SEAL.]	NOAH EDWARDS.	[SEAL.]
LEVI J. COLVIN.	[SEAL.]	JOHN W. CONNER.	[SEAL.]
J. DUNAWAY.	[SEAL.]	G. W. HAMPTON.	[SEAL.]
ISAAC ADAIR.	[SEAL.]	M. R. GILLETT.	[SEAL.]
A. R. CHITWOOD.	[SEAL.]	J. MCINTIRE.	[SEAL.]
JAMES PARKS.	[SEAL.]	JAMES B. GANTT.	[SEAL.]
H. F. HISER.	[SEAL.]	A. RUSS.	[SEAL.]
PLEASANT WALKER.	[SEAL.]	T. J. ANDERSON.	[SEAL.]
G. W. S. WALKER.	[SEAL.]	JAMES H. BASS.	[SEAL.]
DAVID T. HAMPTON.	[SEAL.]	A. C. AVERY.	[SEAL.]
L. P. BEATY.	[SEAL.]	JAMES FREEMAN.	[SEAL.]
J. B. SWENDELL.	[SEAL.]	WM. M. DOYLE.	[SEAL.]
JOHN C. GILLIAM.	[SEAL.]	THOS. F. HULL.	[SEAL.]
J. F. GREENE.	[SEAL.]	DAVID S. CRESMAN.	[SEAL.]
B. C. FEWEL.	[SEAL.]	BIRD D. PARK.	[SEAL.]
HENRY DEVENNY.	[SEAL.]		

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Approved:

A. KREKEL, *Judge.*

And be it further remembered that the November term, 1873, of said circuit court the following opinion was delivered, and is now ordered to be certified with this transcript:

United States circuit court, western district of Missouri, November term, 1873.

ALBERT H. NICOLAY
vs.
ST. CLAIR COUNTY.

1. Where legislative power is given to a county court to subscribe, on behalf of the county, to the stock of railroad company, without restrictions or precedent conditions, and to issue negotiable bonds in payment therefor, and the proper county court issues the bonds, reciting
120 therein that they are issued under an order of said court, made pursuant to legislative act conferring the power, a bona-fide holder for value is not affected with constructive notice of facts recited in the order contrary to the recitals in the bonds.

2. Legislation of Missouri as to power to municipalities to subscribe to the stock of railways, the constitutional provisions of 1865, and the decisions of the supreme court of the State on the subject reviewed, and those decisions followed and applied.

Before DILLON and KREKEL, *J. J.*

Municipal aid to railways.—Special charters.—Constitutional provisions.—Decisions of state supreme court.—Branch railroads.

This is an action upon coupons originally annexed to bonds issued by the county of St. Clair. The coupon' are in the usual form. The following is a copy of one of the bonds, dated July 1st, 1870, from which the coupons in suit have been detached:

"*County bond.*

"UNITED STATES OF AMERICA,
"*State of Missouri, County of St. Clair:*

"Interest ten per cent. per annum, payable on the first days of January and July.

"Know all men by these presents that the county of St. Clair,
121 in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton & Memphis Branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in building said branch railroad, at the Bank of Commerce, in the city of New York, on the first day of July, A. D. 1882, together with interest thereon from the first day of July, 1870, at the rate of ten per cent. per annum, which interest shall be payable semi-annually on the first day of January and July of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

"This bond is issued under and in pursuance of an order of the county court of the county of St. Clair, in the State of Missouri, and in pur-

suance of and by authority of an act of the general assembly of the State of Missouri entitled "An act to incorporate the Tebo and Neosho Railroad Company," approved January 16th, 1860, and of an act of the general assembly of the State of Missouri entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, A. D. 1868.

"In testimony whereof the said county of St. Clair has executed
122 this bond by the presiding justice of the county court of St. Clair County, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court." (The bond is duly signed and sealed.)

The petition states the legal effect of the bond and its recitals, and no question is made as to its sufficiency. Copies of the bonds are filed with the petition.

An answer is filed in denial, and also setting up as an affirmative defence facts intended to show that the county had no power to make the subscription or to issue the bonds. One reason for the alleged want of authority to issue the bonds is, that they were issued without any vote of the people, as required by the constitution of the State, (Art. 11, sec. 14;) that the county court of St. Clair County, on January 21, 1870, without any vote of the people of the county, passed and entered of record an order "to subscribe for and take 2,500 shares of the capital stock of the Clinton and Memphis Branch of the Tebo & Neosho Railroad Company, each of the denomination of $100, and amounting in the aggregate to $250,000, under and by virtue of the authority in the charter of the Tebo & Neosho Railroad Company, approved January 16, 1860, and under an act of the general assembly of the State of Missouri
123 entitled "An act to aid the building of branch railroads in the State of Missouri," approved March 21, 1868, and in accordance with the orders of the board of directors of the said Tebo & Neosho Railroad Company establishing the said branch railroad and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, said stock thus described to be paid for by the issue of the bonds of the county, to be delivered in installments as the work of graduation and the masonry shall be let to responsible persons. The answer contains also an order of the county court, November 1, 1870, reciting the work of graduation and masonry had been let by the Clinton & Memphis branch of the Tebo & Neosho Railroad Company, and ordering bonds for the $250,00' "to be at once signed, sealed, and delivered to said branch railroad company, or to its financial agents appointed to receive and negotiate the same."

The answer sets up and insists that the subscription was, in fact, made and the bonds delivered to the Clinton & Memphis Branch of the Tebo & Neosho Railroad Company, and not to the Tebo & Neosho Railroad Company; and alleges that such a subscription is unauthorized and bonds issued therefor void.

The answer also sets up that after the order of the county court making the subscription as aforesaid, and prior to the issue of the
124 bonds, pursuant to the statutes of Missouri, the Tebo and Neosho Railroad Company, with the assent of its stockholders, sold and conveyed all its rights, franchises, and property to the Missouri, Kansas & Texas Railway Company, (a Kansas corporation,) and thereupon ceased to exist, and the county court ceased to have any authority to issue the bonds to the former company or to the branch. The answer

concludes by alleging that of all the facts therein stated the plaintiff had full notice.

To the new matter in the answer the plaintiff demurs, and it was on this demurrer the case was submitted.

Grant & Smith and Dryden & Dryden for plaintiff, Philips & Vest and Nesbitt & Ferguson for defendant.

DILLON, *Circuit Judge:*

The bonds here in controversy were issued by the county court of St. Clair County, and recite an indebtedness on the part of the county "to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad Company, in the sum of &c., which sum the said county hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid in the building of said branch railroad."

The bonds contain this recital: "This bond is issued under and in pursuance of an order of the county court of the county of St.
125 Clair, in pursuance of and by authority of an act of the general assembly of the State of Missouri entitled 'An act to incorporate the Tebo and Neosho Railroad Company,' approved January 16, 1860, and of an act entitled 'An act to aid in the building of branch railroads in the State of Missouri,' approved March 21, 1868."

The charter of the Tebo and Neosho Railroad Company, thus referred to in the bonds approved January 16, 1860, (Laws 1859–'60, p. 402, sec. 6,) prescribes the termini and general course of the main line of the road, which it authorized this company to build, and gives to the company express authority to "extend branch railroads into and through any counties the directors may deem advisable," without any limitation whatever.

This charter (sec. 8) adopts and re-enacts, inter alia, section 14 of the charter of "the Osage and Southern Kansas Railroad Company," approved November 21, 1857, (Laws of 1857, p. 59,) and declares that section, with others, "to be applicable to the company hereby incorporated, and all the powers therein contained are extended to the Tebo and Neosho Railroad Company."

The 14th section of the charter of the Osage and Southern Kansas Railroad Company, thus adopted, is as follows: "Sec. 14. It shall
126 be lawful for the county court of any county in which any part of the route of said railroad or branch may be, or any county adjacent thereto, to subscribe to the stock of the company, and for the stock subscribed in behalf of the county, may issue bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interest and credit of the county court."

In 1865 the present constitution of the State of Missouri was adopted, containing the following:

"The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." (Art. XI, sec. 14.)

At the time the constitution was framed there was a large number of charters in force specially incorporating railroad companies and authorizing, as in the case of the Tebo and Neosho company, the county courts of counties along their lines or branches, or adjacent thereto, to subscribe for the stock of railroad companies, without any limitation as to amount, and without requiring a previous election or the assent of the

tax-payers or people of the county. That such extraordinary powers, conferred without limit or check upon the small number of persons
127 who compose the county court, would open the *the* door to abuses, to frauds upon the officers, and frauds by them, and to extravagant and unwise indebtedness, ought to have been foreseen by the legislature; although in 1860, and prior to that time, the evils which come from unlimited grants of power of this kind were not so well known as at present.

After the adoption of the constitution of 1865, the question as to the effect of the 14th section of the 11th article thereof, above quoted, upon these special charters, came before the supreme court of the State for its judgment. That court held that power conferred in these special charters upon the county courts to subscribe without a vote of the people were not repealed or touched by the prohibition of the constitution, its view being that the constitution did not affect existing charters, but only limited the power of the constitution in the future. This point was first decided in the Macon County case, (State, ex rel., &c., vs. Macon County Court, 41 Mo., 453, 1867;) and this is the settled law of the State. (The Chillicothe, &c., Co. vs. Brunswick, 44 Mo., 533, 1869; Kansas City, &c., R. R. Co. vs. Aldeman, 47 Mo., 349, 1871; State vs. Sullivan County Court, 51 Mo., 522; Smith & Hall vs. Clark County Court, decided by the supreme court of Missouri, November 3, 1873.)

This last case, the legislat*ure* and judicial decisions of the State on the subject of municipal aid to railways, is reviewed by the able
128 judge who delivered the opinion of the court, in which, speaking of this subject, he says: "So that the provisions of the revised code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as the reports show, not to effect the repeal of the privileges contained in special charters."

Not only so, but the case of the State vs. Sullivan Court, above cited, also decide that under such a charter as the Tebo and Neosho Railway Company the county court of a county along a branch railroad may subscribe for the stock of the company and issue bonds therefor. The subscription in this case, which was sustained by the supreme court of the State, was one by the county of Sullivan "to the St. Joseph and Iowa Railroad Company, in the name and for the use of the Central Branch of the St. Joseph and Iowa Railroad Company," the same precisely as the one recited in the bonds in question issued by the county of St. Clair.

The decisions of the supreme court of the State, therefore, settle the point that under the charter of the Tebo and Neosho Railroad Company the county court of St. Clair County had the power to make, without any vote of the people of the county,
129 precisely the kind of a subscription which the bonds in suit recite they did make, and to issue the bonds of the county therefor. The county court having the power to subscribe and to issue the bonds, and a valid subscription being recited in the bonds, the plaintiff can recover thereon, if he purchased them bona fide for value, and without actual notice of any irregularities in the exercise of the power by the county court. The securities are authorized and made to be sold in distant places, and the Supreme Court of the United States has repeatedly decided that a purchaser of such bonds, while he is bound to ascertain whether the legislature has conferred the power to issue them, is not bound to as-

certain whether the local officers intrusted with the execution or carrying out of the authority have properly pursued the directions or requirements of the law authorizing their issue. The cases in the Supreme Court are collected and stated in Dillon on Municipal Corporations, sec. 415 et seqr. See also Kennicott vs. Wayne County, Dec. term, 1872, and Hindekoper vs. Buchanan County, decided here at this term. A bona-fide purchaser of one of these bonds is not bound to look into the records of the county court which made the subscription, and is not chargeable with constructive notice of their contents; and hence the
130 fact that the order shows that the subscription by the county court of St. Clair County was not to the capital stock of the Tebo and Neosho Railroad Company, but to the stock of the "Clinton and Memphis Branch of the Tebo and Neosho Railroad Company," is no defense, provided the plaintiff is a holder of the bonds for value, and without actual notice of the fact.

These views dispose of the only defense which counsel have urged in their briefs, unless actual notice to the plaintiff of the facts set forth in the orders of the county court is intended by the pleader.

If he intends to rely upon constructive notice only, the plea should be modified accordingly, and in that event the demurrer to the answer will be sustained. If he means actual notice, then the demurrer should be overruled; or at least we should consider further, whether, under the charter or under the act of March 21, 1858, (relating to branch railroads,) recited in the bond or both, there was any power to subscribe by the county to the stock, not of the company, including the branches, but to the stock of the branch alone.

* * * * * * *

131 THE UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, do hereby certify that the above and foregoing is a true, complete, and full transcript of the record and proceedings had in the above-entitled cause, now here certified in accordance with the mandate of the writ of error herein and the stipulations filed in this cause.

In witness whereof I have hereto signed my name and affixed the seal of said court at office in the city of Jefferson this 22d day of May, A. D. 1874.

[SEAL.] M. M. PRICE, *Clerk.*
By C. M. WARD, *Deputy.*

(Indorsement on cover:) No. 264. Henry County, plaintiff in error, vs. Albert H. Nicolay. W. Missouri C. C. U. S. Filed 11th January, 1875.

REC. 264—5

IN THE

SUPREME COURT

—— OF THE ——

UNITED STATES,

At Washington City, D. C.,

FOR THE

OCTOBER TERM, 1877.

HENRY COUNTY,

Plaintiff in Error,

VERSUS

ALBERT H. NICOLAY,

Defendant in Error.

PHILIPS & VEST, COUNSEL FOR PLAINTIFF IN ERROR.

SEDALIA DEMOCRAT PRINT.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY COUNTY,

Plaintiff in Error,

VERSUS

ALBERT H. NICOLAY,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR, BY PHILIPS & VEST, COUNSEL.

This is an action instituted by Defendant in Error against the Plaintiff in Error, in the Circuit Court for the Western District of Missouri.

The petition is as follows:

"The Plaintiff, Albert H. Nicolay, who is a citizen of the State of New York, for an amended petition, leave of the Court to file the same being first had and obtained, states that the Defendant, Henry County, a muncipal corporation, created by, and existing under the

laws of the State of Missouri, and a citizen of the State of Missouri, heretofore, on or about the 1st day of January, A. D. 1871, by its certain writing obligatory, called Bond No. 1, signed by William Jennings, the then Presiding Justice of the County Court of said County of Henry, attested by J. N. Barline, the then Clerk of said County Court, and sealed with the seal of said County Court, and herewith filed, acknowledged itself to be indebted and bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, and promised to pay to the said Tebo and Neosho Railroad Company, or to the bearer, the sum of one thousand dollars, at the National Park Bank, in the City of New York, on the 1st day of January, 1881, together with the interest thereon, from the 1st day of January 1871, at the rate of ten per centum per annum, in semi-annual installments of fifty dollars each, payable on the 1st days of July and January of each year, on the presentation and delivery at said Bank, of certain coupons severally thereunto subjoined. And the Plaintiff says that he is the bearer and holder of said bond, and also of the coupon for the second installment of interest, amounting to fifty dollars, due thereon the 1st day of January, 1872, which was subjoined to said last named bond as aforesaid, and is now also herewith filed; that although when said installment of interest became due, to wit: On said 1st day of January, 1872, said last named coupon was duly presented for payment at the said National Park Bank in the City of New York, and payment thereof was requested, yet the same was not, nor has since been paid, but remains now due and wholly unpaid. Whereof Plaintiff prays judgment for the said last named sum, with interest thereon, from the 1st day of January, 1872, and his costs herein."

And on the 4th day of February, 1873, the counsel stipulated that the answer of Defendant, made to the first count of the petition, should be considered as made to all the counts of the petition, the petition containing several counts.

The answer of the Defendant, in substance, is as follows: It admits that the Presiding Justice of the County Court, and one J. N. Barline, as clerk thereof, claiming to act as agents of said county, at the date alleged in the petition, did issue a certain writing, in the form of an obligation called Bond No. 1, but whether such bond was attested by J. N. Barline, Defendant has no knowledge or information sufficient to form a belief. It also put in issue the allegation of the petition, as to the presentation and demand of payment of interest on said coupon. The answer then alleges that said bond and coupon were issued without authority of law, or the consent of Defendant; and are fraudulent

and void; that the said Justice and clerk had no authority or power to bind the Defendant by the written instruments aforesaid; that the County Court never ordered or directed the said Justice and clerk to issue said bond or coupon to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad.

It alleges that in the month of ———, 1870, certain scheming speculators conceived the project of starting the construction of a railroad from Kansas City, Missouri, to run in an easterly direction, through the town of Clinton, in said County of Henry, and thence eastward toward the city of Memphis, in the State of Tennessee; and being wholly dependent, for the prosecution of said enterprise, upon aid and money to be obtained from the counties along the line of said projected road, and to avoid the provisions of the 14th section of the 11th article of the Constitution of the State of Missouri, then and yet in force, which prohibited the said county from becoming a stockholder in, or loaning its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, at a regular or special election therein, should assent thereto, the said speculators conceived the idea of designating this projected road a branch of the Tebo and Neosho Railroad, a corporation chartered by act of the Legislature of the State of Missouri, approved January 16th, 1860, so as to enable them, by adroit management, to obtain from the said County of Henry, and other counties along the route of said road, subscriptions to aid in the said enterprise, without first obtaining the assent thereto of two-thirds of the qualified voters of such counties, as by the Constitution aforesaid required. And accordingly they designated that part of the road southeast of Clinton, as the Clinton and Memphis Branch, and that part northwest of Clinton, the Clinton and Kansas City Branch, of the Tebo and Neosho Railroad, assuming and asserting that the said Branches were organized pursuant to the provisions of the charter of the said Tebo and Neosho Railroad Company, and especially pursuant to, and under the provisions of, an act of the General Assembly of the State of Missouri, entitled, "An act to aid in the build-

ing of Branch Railroads in the State of Missouri." approved March 21st, 1868.

The answer then alleges that the then directory of the said Tebo and Neosho Railroad Company, in June, 1870, having knowledge of the facts aforesaid, connived at the said fraudulent design, and consented to the designation of the said projected road as Branches of the said Tebo and Neosho Railroad; but with the distinct understanding between them that the said projected road was not in fact to be a Branch of the Tebo and Neosho Railroad, but was in fact and law to be entirely separate from, and independent of, the same; its stock to be separate, as also its control and management; and that the said Tebo and Neosho Railroad Company had in fact done nothing more, or any other act or thing, looking to the recognition or establishment of said Branch roads. Yet said speculators afterwards, in pursuance of their said scheme, on the 1st day of August, 1870, without the solicitation, knowledge or consent of said Tebo and Neosho Railroad Company, obtained from the County Court of Henry County an order, so much of which as is pertinent to the issues herein, is as follows:

"In the matter of the application of the Clinton and Memphis Branch of the Tebo and Neosho Railroad for a subscription to the capital stock of said Branch road, from the county of Henry, to aid in the construction of said Branch road.

The Court, after due deliberation, being fully satisfied that the resources of the county will be materially enlarged, and that additional and profitable markets will be opened to the people of the county, by the building of said Branch railroad, it is considered ordered and adjudged by the Court, that the County of Henry, in the State of Missouri, do subscribe for and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting in the aggregate to the sum of one hundred and fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the act of General Assembly of the State of Missouri, entitled, "An act to aid the building of Branch Railroads in the State of Missouri," approved March 21st, 1868, and in accordance with the resolution and orders of the Board of Directors of said Tebo and Neosho Railroad Company, establishing said Branch Railroad Company, authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, the said capital stock to be paid for by the is-

sue and delivery to the committee appointed to construct said Branch road, of the coupon bonds of the County of Henry, of the denomination of one thousand dollars, each bearing date the 1st day of January, A. D 1871, with interest at the rate of ten per centum per annum, payable semi-annually, at the National Park Bank in the city of New York, at which place the principal of said bonds shall also be payable, ten years after the date thereof; the said bonds to be signed by the presiding justice of this court, and attested by the clerk of this court, under the seal thereof, and the coupons to be signed by said clerk.

* * * * * * * * * * * * *

Ordered further, that Joseph Hillegas be, and is hereby appointed the agent of the county to subscribe the stock aforesaid, to aid in the construction of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, in accordance with the terms of the foregoing order; and that he cause to be prepared and signed the said coupon bonds of the County of Henry, and that the same be delivered only in accordance with the foregoing order."

The answer alleges that the said order was and is the only order (save a similar one made touching the so called Clinton and Kansas City Branch) ever made by said County Court, directing the issue of any bonds for the use of, or pertaining to, said so-called Clinton and Memphis Branch of the Tebo and Neosho Railroad; and the same is the order, and none other, referred to and named on the face of the bonds mentioned, and declared upon in the Plaintiff's petition, under which the said bonds and coupons so mentioned as aforesaid in the petition of the Plaintiff, were issued. That said County Court had no right and authority in law to make said order, for that this Defendant alleges that the so-called Clinton and Memphis Branch road never had any legal existence, and if in fact and law it did so exist, it was under and pursuant to the provisions of the said act of the General Assembly of the State of Missouri, approved March 21st, 1868, which in purpose and effect created said branch an independent franchise, with privileges and powers not guaranteed by, or derivable from, the charter of the said Tebo and Neosho Railroad; and defendant claims and alleges that the said County Court had no power or authority to subscribe said stock to said Branch Road, as attempted by its said order, without first having obtained the assent thereto of two thirds of the qualified voters of said county, as in such case provided and required by the Constitution of the State of Missouri as aforesaid.

The answer alleges the fact to be that the assent of the qualified voters of the said County of Henry, was not so obtained thereto; that no election therein was ever had, or vote taken, or permitted to be taken, in the matter of issuing said bonds, as by the constitution required.

It is furthermore insisted that the said bonds were neither ordered to be issued to, nor were they in fact issued or delivered to, said Tebo and Neosho Railroad Company, nor were they received by it directly or indirectly; that by said order they were directed to be issued to said Branch Road; and to be delivered to a so-called committee who were in fact said speculators—a self-appointed committee to construct said Branch Road, who received the said bonds; and the said Tebo and Neosho Railroad Company never had anything to do with said bonds or their proceeds.

The answer then claims and pleads that after said speculators had obtained, as aforesaid, the adoption of said resolutions, designating said enterprise as a Branch Road of the Tebo and Neosho Railroad, and prior to the issue of the bonds aforesaid, by said County Court, the Tebo and Neosho Railroad Company, pursuant to statute adopted in 1870, by articles of agreement and sale, did sell and transfer all its rights, franchises and property to the Missouri, Kansas and Texas Railway Company, a corporation organized and existing under the laws of the State of Kansas, which was duly ratified and accepted by said Missouri, Kansas and Texas Railway Company, filed and entered of record in the office of Secretary of State of the State of Missouri, as by law provided. That thereafter the said Tebo and Neosho Railroad Company passed to and vested in said Missouri, Kansas and Texas Railway Company, and the said T. & N. R. R. Co., south of the Pacific Railroad, ceased to exist as such company; and the authority, if any, of said speculators and committee, claiming to act for and in behalf of said Branch Road, so far as their authority therefor was claimed to emanate from the said T. & N. R. R. Co., was revoked and annulled; and the act of so issuing said bonds was unauthorized and nugatory.

That the bonds were not issued or delivered to said M., K. & T. Ry. Co., nor were they issued or delivered at its solicitation, nor with

its knowledge and consent, nor had it anything to do with them; that it has never recognized the existence of said Branch Roads nor had anything whatever to do with the same.

The answer then proceeds to set out the proceedings instituted and prosecuted to final judgment in the Common Pleas and Circuit Courts of said county, in an action of injunction, at the relation of W. N. Pickerell, Circuit Attorney in and for the 22d Judicial Circuit of the State of Missouri, against the Justices of the County Court of said county and the other officers thereof, to enjoin them from doing any further act or thing whatsoever looking to the execution of said order of subscription, or the assessing or levying or collecting of any tax or taxes for the payment of either the principal or interest of said bonds, alleging as grounds therefor the matters and things hereinbefore charged, and averring fraud and collusion between said speculators and the directory of said T. & N. R. R. Co. and the Justices of the County Court aforesaid.

This action was instituted on the 11th day of January, 1872, and at the August Term, 1872, the said cause, after being heard by said Circuit Court, was determined in favor of the relator, and a perpetual injunction was decreed, as prayed for; which said judgment remained unappealed from and unreversed, and is in full force.

The answer averred that, of all the matters and facts therein pleaded, the Plaintiff, at the time he became the bearer of the bonds and coupons mentioned in his petition, had notice, and was affected and bound thereby.

To this answer the Defendant in Error demurred. The demurrer was overruled; and he thereupon filed the following replication:

"And now comes the plaintiff by his attorneys, Grant & Smith, and for reply to so much of the answer filed herein as he is advised it is material for him to reply to, says it is not true that of all or any of the matters and allegations and facts set up in answer of Defendant herein, Plaintiff, during all the time therein stated, or at any time, had notice, nor that he is affected thereby, and he prays as heretofore."

At the April Term, 1874, the cause came on for hearing, and the same was submitted to a jury for trial. The Plaintiff, to sustain the issues on his part, read in evidence the following bond, to-wit:

"*Henry County Bond.* $1000. *State of Missouri.* Interest ten per cent. per annum, payable semi-annually on the first days of January and July.

Know all men by these Presents, that the County of Henry, in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo and N. R. R. Co., to the use and in the name of the Clinton and Memphis Branch of the T. & N. R. R., in the sum of one thousand dollars, which sum the said county hereby promises to pay to the T. & N. R. R. Co., or bearer, to aid in building said Branch Railroad, at the National Park Bank, in the city of New York, on the 1st day of January, 1881, together with interest thereon at the rate of ten per cent. per annum, which interest shall be paid semi-annually on the first days of July and January of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined."

This bond is issued under and in pursuance of an order of the County Court of Henry county, in the State of Missouri, and in pursuance of, and by authority of, an act of the General Assembly of the State of Missouri, entitled, 'An Act to Incorporate the T. & N. R. Co.,' approved January 16th, 1860, and of an act of the General Assembly of the State of Missouri, entitled, 'An Act to aid in the Building of a Branch Railroad in the State of Missouri,' approved March 21, A. D. 1868.

In testimony whereof, the said county of Henry has executed this bond, by the presiding Justice of the County Court of Henry county, and the order of said court, signing his name thereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court.

This done at the city of Clinton, county of Henry aforesaid, this first day of January, A. D. 1871.

WILLIAM JENNINGS,
Presiding Justice of County Court of Henry county.
Attest: J. D. BARLINE,
Clerk of the County Court of Henry county."

The Plaintiff then read in evidence the following coupon, to-wit:

$50.] [$50.

"CLINTON, HENRY COUNTY, January 1st, 1871.

The County of Henry acknowledges to owe the sum of fifty dollars on the first day of July, 1873, being interest on bond No. 120, for one thousand dollars. This coupon is payable at the National Park Bank, in the city of New York.

J. N BARLOW,
Clerk Henry County Court."

Plaintiff then put in evidence the other coupons named in the several counts of his petition, and rested his case.

As the replication of the Plaintiff put in issue only the question of notice to the Plaintiff below of the matters pleaded in the answer,

said facts, except as to such notice, under the practice act of the State, stood admitted; but the Defendant, as matter of form and certainty, read in evidence, by consent of parties, the order of subscription heretofore stated and set up in the answer. It likewise read in evidence the deposition of John N. Barlow, Jared Stevenson, R. S. Stevens, Cyrus Newkirk and Charles H. Snyder.

John N. Barlow testified, in substance, that he was Deputy County Clerk of Henry county; that he held the office of County Clerk thereof from July, 1865, to January, 1871, and had been continuously in said office from 1865 to the present time; that the order of subscription aforesaid was made by said County Court, and is the only one made by it in respect to the issue of bonds in question; that there was no election ordered by said County Court, and no election in fact was held, to test the sense of the voters of said county touching the said subscription, as required by the 11th article of the Constitution of the State; that the bonds in question were delivered to one Mr. D. C. Stone, of Clinton, Missouri, who gave his receipt therefor; that Mr. Stone afterwards took up his receipt and gave in its place certificates of stock in the Clinton and Memphis Branch Road; that Mr. Stone was at the time acting in the capacity of President of said Branch Road, and he delivered the bonds to him as such President; that Mr. Stone at this time was keeping a broker and exchange dealer's office in Clinton, Henry county, Missouri; that he had no knowledge of Mr. Stone's having any connection with the T. & N. R. R. Co.; that there was no certificate of stock issued by either the T. & N. R. R. Co. or the M., K. & T. Ry. Co., to Henry county, on account of the subscription aforesaid.

Jared Stevenson testified, in substance, that he was one of the Justices of the County Court of Henry county from 1869 to the present time, and was on the bench when the order of subscription aforesaid was made; that that was the only order made in respect to the issue of bonds to the Branch Railroad aforesaid; that there was no election ordered or held to take the sense of the people to authorize said subscription, and that the court declined to order such election because

they feared the people would not vote for such subscription, and they would lose the road; that the subscription was made upon the application and at the instance of a number of persons in Clinton, among whom were A. D. LaDue, Judge McBeth, William Weaver and others; that he did not know who got the bonds, and that the county got no certificate therefor of stock in either the T. & N. R. R. Co. or the M., K. & T. Ry. Co.

R. S. Stevens testified, in substance, that he was General Manager of the M., K. & T. Ry. Co., and held that position for over three years, and ever since the organization of the company; that the T. & N. R. R. Co. was sold, with all its rights, franchises and property, and transferred to the M., K. & T. Ry. Co., on the 11th day of October, 1870, and that thereafter the property, rights and franchises of the T. & N. R. R. Co. passed under the exclusive control and management of the M. K., & T. Co.; that the officers and directors of the T. & N. R. R. Co. thereafter had nothing to do with, nor any control over, the road; that the M., K. & T. Ry. Co. never authorized the construction or creation of the so-called Clinton and Memphis Branch Road, nor had his company ever solicited, or authorized any one for it to solicit, from the County Court of Henry county, subscriptions to the capital stock of either of said companies or so-called Branch Road, or to aid in its construction; that his company never in any way accepted said subscription, nor did it ever receive any bonds issued thereunder, or other bonds from said county; that they never appointed any agent in respect to the said Branch Roads; nor did any of the parties connected therewith ever report to his company any of their acts or doings in connection with said Branch Roads; that his company had never issued any certificates of stock on any subscription to said Branch Road, nor was it under any obligation to do so.

Cyrus Newkirk testified, in substance, that in 1870 he was a Director in the T. & N. R. R. Co., and its Treasurer; that about the month of June of that year, Peter A. LaDue and other citizens of Clinton, Missouri, desiring to forward the project of a railroad from Kansas City, Missouri, in the direction of Memphis, Tennessee, in order to avoid the

necessity of obtaining the consent of two-thirds of the qualified voters of the counties through which such proposed road would pass, as required by the Constitution, sought permission of the Directory to designate the said projected road as a Branch of the T. & N. R. R. in order to claim the privileges of its charter; to which they consented, with the understanding between the parties that the company was not to be in anywise responsible for the acts or liabilities of such Branches, nor was the Company to build or construct them. The Branch roads, in fact, were to be entirely independent of the company; that his company never solicited any subscription from the County Court of Henry County to aid the building of said Branch Roads, nor had they anything to do therewith; that no one connected with said Branches ever reported to the T. & N. R. R. Co., nor did the company ever accept any subscription from said county on account of said Branch roads, nor had his company ever ratified them; that his company never issued any certificate of stock to Henry County for any subscriptions to said Branch roads, or either of them, nor had they ever contracted so to do; that his company was sold out and transferred to the M., K. & T. Ry. Co. on the 11th day of October, 1870; that from and after that date the company passed under the exclusive management and control of the M., K. & T. Ry. Co., and thereafter the officers and directors of his company ceased to have anything to do therewith; that he had known Mr. Stone, of Clinton, Henry county, Missouri, for four or five years; that he was never connected with the T. & N. R. R. Co., nor was he ever employed to solicit or obtain any subscription from counties for his company; that no bond or bonds issued by Henry County for the use or benefit of the Clinton and Memphis, or the Clinton and Kansas City Branch, was ever received by said company.

The Defendant below also put in evidence, as a part of the record of the Henry County Court, the following, appended to the order of subscription heretofore mentioned, to-wit:

"Jared Stephenson (one of the Justices of the County Court,) dissenting, protests against the above order of the Court, for the following reasons:

1. The Court is prohibited by the 17th Section of Chapter 63

of the General Statutes of Missouri, from taking the stock it subscribed, or to loan its credit to, said proposed railroad, without having first ordered an election, at which two-thirds of the qualified voters of Henry County should give their assent to such subscription; there having been no such election, the said subscription is illegal and void.

2d. Because there is no legal corporation organized under any law of this State by the name of the Clinton and Memphis Branch of the Tebo & N. R. R., nor any lawfully authorized corporation by the name of Clinton and Kansas City Branch of the T. & N. R. R.

3d. Because the County Court has no right to do indirectly what she is prohibited from doing directly by the statutes before cited, namely: To vote money and aid to a railroad organized since the adoption of the New Constitution of Missouri, without the preliminary steps of an election, at which two-thirds of the qualified voters of the county should vote in favor of the subscriptions.

4th. Because, by the order of the County Court of last Term, the subscription was agreed to be voted by a majority of this Court upon a petition of a majority of the tax-payers of Henry county, and there has been no legal or sufficient evidence produced to the Court that said majority have so petitioned.

5th. Because, in view of the burdensome taxation already imposed upon the citizens of Henry county, I consider this new tax ruinous in its tendencies, and inexpedient at this time."

The defendant also put in evidence the order of subscription aforesaid. Also the deed of sale from the T. & N. R. R. Co. to the M., K. T. Ry. Co., of date the 19th day of October, 1870, executed in pursuance of resolutions adopted by the former company October 11th, 1870, authorizing the sale. The substantial part of said deed is as follows:

"This indenture, made the 11th day of October, in the year of our Lord one thousand eight hundred and seventy, between the T. & N. R. R. Co., a corporation organized under the laws of the State of Missouri, party of the first part, and the M., K. & T. Ry. Co., a corporation organized under the laws of the State of Kansas, party of the second part, witnesseth, that in consideration of the sum of one dollar, paid to the said party of the first part, by the said party of the second part, the receipt of which is hereby acknowledged, and of the benefits and advantages them thereunto moving, and in accordance with a resolution of the stockholders of the party of the first part, passed on the 11th day of October, A. D. 1870, and the consent, in writing, of a majority in interest of the stockholders of the party of the first part, the said parties of the first and second parts have reciprocally covenanted and agreed, to and with each other, as follows:

The party of the first part doth hereby sell, convey and transfer to the said party of the second part, all its privileges, rights, powers,

franchises, real estate and other property, the whole or a part of which is in this State, excepting only such as belong to the extension of the T. & N. line north from Sedalia *via* Boonville, Fayette and Moberly to the railroad bridge at West Quincy, declared July 2d, 1869, certificate of which, dated July 3d, 1869, was filed in the office of Secretary of State, and doth consent to a merger of the same, with the franchises, property and rights of the said party of the second part; and the said M., K. & T. Ry. Co., party of the second part, shall have, exercise and enjoy, all the rights, powers, privileges and immunities of the original charter of the T. & N. R. R. Co., and of the several amendments thereto, in the same manner and to the same extent as has been heretofore exercised and enjoyed by the said party of the first part, or by the several shareholders in said company, whose stock shall be exchanged as herein provided, either or both; and the said party of the second part does hereby accept the terms and conditions of the within instrument."

Which deed was duly filed and recorded in the office of the Secretary of State.

Defendant, below, then put in evidence the proceedings and judgment in the action for injunction, at the relation of William N. Pickerell, Circuit Attorney, etc., against the Justices of the County Court of Henry county *et al*, as shown from page 30 to 43 of the printed record in this cause.

The Defendant, below, then read in evidence the deposition of Foster P. Wright, of Clinton, Henry county, Missouri, who testified, in substance, that about the 1st of February, 1871, he received a letter at Sedalia, Missouri, from Mr. D. C. Stone, of Clinton, Missouri, requesting him to come to Clinton for the purpose of giving an opinion in regard to the validity of certain bonds issued by the counties of Henry and St. Clair, in aid of the Clinton and Memphis Branch of the T. & N. R. R; that at that time he was an attorney at law, practicing at Sedalia, Missouri; that he went to Clinton, and Mr. Stone handed him a letter from the Plaintiff, Mr. Nicolay, of New York, requesting his opinion in regard to the validity of those bonds; that the letter was mislaid; that he prepared an opinion accordingly, marked exhibit "A," and handed it to Mr Stone to mail to Mr. Nicolay; and Mr. Stone paid him one hundred dollars therefor; that he examined the proceedings and records in respect to said subscription, preliminary to the preparation of said opinion; that his opinion was asked principally

as to the validity of said subscription in view of the New Constitution, there having been no election by the people authorizing such subscription; that he gave his chief attention to that.

The opinion thus furnished by Judge Wright to Mr. Nicolay, was also put in evidence, presenting the discussion of the validity of the subscription and bonds in question, under the charter of the T. & N. R. R. Co., and the act of the Legislature of the State of Missouri, entitled, "An Act to aid in the Building of Branch Railroads in the State of Missouri," approved March 21st, 1868, and the 14th Section of the 11th Article of the Constitution of Missouri, requiring a two-thirds vote of the qualified voters of the county to authorize the County Court to make such subscription; the opinion conveying to Mr. Nicolay the information that no such election was had authorizing the subscription in question: See pages 3, 4, 5, 6, 7 and 8, 44 and 45 of the printed transcript of record herein.

The Defendant then introduced as a witness, Harvey W. Salmon, Treasurer of the State of Missouri, who testified, in substance, that in 1871, he lived at Clinton, Missouri, and was a member of the firm of Salmon & Stone, Brokers and Bankers at that place—the said Stone being the D. C. Stone who was then President of the Clinton and Memphis and Clinton and Kansas City Branch of the T. & N. R. R. Co.; that about the 20th of January, 1871, he went to New York City to negotiate, for said Branch Railroads, the bonds in question, which were held by said Stone; that he met in New York the Plaintiff, who was a broker, who proposed to negotiate said bonds for him; that he showed to the Plaintiff the orders of the County Court of Henry county aforesaid, and of St. Clair county, making the subscription to said Branch Road; the Plaintiff examined them, and said before he would deal with the bonds he wanted a lawyer to investigate the regularity of the issue of the bonds by said counties; that Plaintiff told him he had solicited Judge F. P. Wright, of Sedalia, Missouri, to do this for him; that he afterwards saw, in Plaintiff's office, the manuscript of said Wright's opinion to him, and that Plaintiff had the opinion printed; that the paper marked exhibit "A," with the deposition of said Wright herein, is the opinion alluded to; that at said time the Plaintiff had not bought

any of said bonds; that he afterwards sold Plaintiff one hundred and seventy-one thousand dollars of said bonds at 82½ cents; he supposed that Mr. Stone paid Judge Wright for his opinion out of the proceeds of the bonds. In August, 1871, he made the contract with Plaintiff for the sale of the balance of the bonds. He sold him some prior to August, 1871. The Plaintiff was to take 30 of them per month. The last were delivered to him in May, 1872. Witness stated that the protest of Judge Stephenson was not in the transcript of the Henry county record exhibited by him to Nicolay.

This was all the evidence.

Thereupon Plaintiff demurred to the evidence of Defendant, below, as insufficient to establish any defense to the action; which demurrer the Court, against the objection of the Defendant, sustained, and directed the jury to return a verdict for the Plaintiff; to which the Defendant duly excepted. Thereupon the jury found for the Plaintiff, and assessed his damages at the sum of nineteen thousand, six hundred and forty-eight dollars and forty-six cents. Judgment was entered accordingly.

The Defendant filed motion for new trial, assigning as error the action of the Court in sustaining the said demurrer to the Defendant's evidence, and directing the jury to find a verdict for the Plaintiff, and because the verdict was contrary to the law and the evidence, and should have been for the Defendant. Which motion the Court overruled, and the Defendant excepted.

Thereupon the Defendant filed his motion in arrest of judgment, assigning as grounds thereof:

"1st. Because the petition does not state facts sufficient to constitute a cause of action.

2d. Because it does not appear from the petition, that the County Court had any authority or power to issue the alleged bonds, upon which Plaintiff's action is founded; nor does it appear therefrom by what authority or law the said bonds were issued."

Which motion the Court overruled, and Defendant excepted.

It was stipulated by counsel herein, that, in making up the transcript of the record, the clerk should include the first count, and no more, the other counts in the petition being similar thereto, and

amounting in the aggregate to the amount specified in the verdict of the jury.

Defendant filed Bill of Exceptions, and duly brings the case to this Court on Writ of Error; and asks a reversal of the judgment of the Circuit Court, principally on the following grounds:

1st. Because, if the validity of the subscription in question is attempted to be sustained, under the charter of the T. & N. R. R. Co., it is answered that, under said charter, the County Court was only empowered to subscribe *"to the stock of the company,"* whereas the subscription in question is to the capital stock of *"the Clinton and Kansas City Branch of the T. & N. R. R."*

2d. Because the bonds in question were not issued in conformity to the order of the County Court, and were wholly unauthorized.

3d. If the validity of the bonds be attempted to be sustained, under the act of March 21st, 1868, under which they purport to have been issued, the Plaintiff must fail in his action, because the County Court could not, under said act, subscribe to the Branch Road created thereunder, without first obtaining the assent thereto of two-thirds of the qualified voters of the county, expressed through the polls, as prescribed and required by the 14th Section of the 11th article of the Constitution of the State of Missouri; and because no such election was held.

4th. Because the Branch Road to which the subscription in question was made, was, in fact and legal effect, a separate franchise, possessing a *quasi* independent corporate existence, not derived from the charter of the T. &. N. R. R. Co., but conferred, if at all, in the first instance, by the said act of March 21st, 1868, and as such was subject to the provisions of the existing Constitution of the State, and the Statutes thereof in *pari materia*.

5th. Because the issue of the bonds, in manner and form as done after the sale and transfer of the T. & N. R. R. Co. to the M., K. & T. R'y Co., was unauthorized under the order of subscription made by the County Court, and the Plaintiff acquired no title thereto, as against Henry county.

6th. Because said subscription, and the said bonds, were procured from the County Court in pursuance of a fraudulent conspiracy, and are fraudulent in law and fact.

7th. Because the plaintiff was not an *innocent purchaser*. Of the matters and facts pleaded in the answer, the evidence showed beyond all controversy, that, of their principal features, the plaintiff, before he became the bearer of any of the bonds, had direct notice; and of the remaining features and indices of fraud alleged in the answer, there was sufficient proof of facts and circumstances to have entitled the Defendant to have the finding of the jury thereon.

8th. Because the Circuit Court manifestly erred in overruling the motion in arrest of judgment. The petition shows no cause of action against Henry county, in that it utterly failed to show under what authority of law the county issued the bonds in question.

PHILIPS & VEST, COUNSEL FOR PLAINTIFF IN ERROR, SUBMIT THE FOLLOWING ARGUMENT AND AUTHORITIES.

I.

Under the practice act of the State of Missouri, which, under an act of Congress, controls the rules of practice, to a specified extent, in U. S. Circuit Court:

"Where the answer contains new matter, the Plaintiff shall reply to such new matter. * * * * Denying specifically each allegation controverted by him." (Wag. Stat., Ch. 110, Art. 5, Sec. 15, Page 1017.) "And every material allegation of new matter contained in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true." (Ibid, Sec. 36, Page 1019.)

Adopted in rule 35, in Circuit Court Rules for Districts of Mo.

As the Plaintiff's reply only put in issue the question of notice to him of the facts and matters pleaded in the answer, all the allegations of fact contained in the answer stood confessed, and it only remained for the Defendant to establish the notice, actual or constructive.

The testimony of Judge Wright and Harvey Salmon fully established, that, prior to the purchase of the bonds, the Plaintiff had direct notice of the contents of the subscription in question, and that their issue was not authorized by the qualified voters of Henry county, as provided in Section 14, Article 11, of the State Constitution. The most important questions, lying at the very threshold of this controversy, are: Was it competent, under the charter of the T. & N. R. R. Co., for the County Court to subscribe for stock, as it did do, in the Branch Road; and if not, could it, under the provisions of the act of the legislature of March 21, 1868, do so without a compliance with the provisions of the said section of the State Constitution? In sustaining the demurrer to the evidence, and taking the case away from the jury, the Circuit Court decided both of these propositions in the affirmative.

The charter of the T. & N. R. R. Co. was granted and approved by the Legislature of the State, January 16, 1860. (Laws of Mo. 1859–60, Page 402.) By the latter clause of the 6th Section, the Directors "may extend Branch Railroads into and through any counties that the Directors may deem advisable." Section 8 adopts and re-enacts *inter alia* Section 14 of the charter of the Osage Valley and Southern Kansas Railroad Company, approved November 21, 1857, which Section is as follows:

"It shall be lawful for the County Court of any county in which any part of the route of said railroad or branches may be, or any county adjacent thereto, to subscribe to the stock of the Company * * * * And for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay the same, and to take proper steps to protect the interests and credit of the County Court; may appoint an agent to represent the county, vote for it, and receive its dividends." (Laws of Mo., 1857, Adj. Ses., Page 62.)

The authority of the County Court to subscribe stock is conferred *alone* by this Section. What is this power? It is "*to subscribe to the stock of the Company.*" Nowhere is the power given by this charter to subscribe to the stock of a *Branch* Road. The subscription in question is to "the Capital Stock of the Clinton and Memphis Branch of the T. & N. R. R," which the Plaintiff knew when he bought the bonds. This the County Court could not do.

(*a*). Counties in Missouri are mere *quasi* corporations, invested with corporate powers *sub modo*; deficient in many of the powers incident to the general character of corporations; and while, in a certain sense, they are auxiliaries of the State government, and deputy trustees of the people, yet their courts are purely creatures of the State statute, with limited jurisdiction, possessing no powers not expressly conferred on them by the Legislature.

Strouse vs. Drennon, 41 Mo., 297.

Reerdon vs. St. Louis Co., 36 Mo., 561.

Goodnow vs. Com. Ramsey Co., 11 Minn., 31.

Louisville & N. R. R. Co. vs. County Court, 1 Sneed, 637 and 687.

Marshall, C. J., in Head vs. Providence Ins. Co., says:

"It is a general rule that a corporation can only act in the manner prescribed by law. It is precisely what the Incorporating Act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Pg. 166-167.

In the Dartmouth College case, 4 Wheat., 636, the Court says, a corporation, "being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Being created by statute, they depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.

Bank vs. Dandridge, 12 Wheat., 64.

Campbell, J., in Pearce vs. M. & J. R. R. Co. *et al*, 21 Howard, 443, says:

"Persons dealing with the managers of a corporation, must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantages the public is to receive from their discreet and intelligent employment; and the public have an interest, that neither the managers nor stockholders of the corporation shall transcend their authority."

Davis, J., in Thomson vs. Lee County, 3 Wall., 330, says.

"A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the Legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not, in express terms, conferred upon it."

Statutory provisions, authorizing charges upon the public, must be construed strictly. Such powers cannot be created by implication, nor extended by construction.

Stockton & Darlington R. R. Co. vs. Barrett, 11 Clark & F., 590.
8 Scott, N. R., 641.
Penn. R. R. Co. vs. Canal Com'rs, 21 Pa., St. 9.
Wright vs. Briggs, 2 Hill, 77.
Morris C. & B. Co. vs. Central R. R. Co., 16 N. J. Eq. (1 Green), 419.

Especially ought this rule of construction to be rigidly adhered to in a case like the one at bar, where the sovereign right is claimed by the incorporators to take private property for public use, and to subject a whole community, without their consent, to an enormous tax.

Morehead *et al*, vs. Little Miami R. R. Co., 17 O., 350-1.
Bradley vs. N. Y. & N. H. R. R. Co., 21 Conn., 294.

Subjected to these tests, how can the subscription in question be sustained? The Legislature only authorized this County Court to subscribe to the *stock of the company*. By the subscription authorized by the charter granted, the county became a stockholder in the entire property and profits of the corporation—its main line and its branches—the *whole company*. The branches contemplated by the Legislature and authorized by the 6th section of the charter, were to be but tributaries and feeders to, and a part and parcel of, the railroad company; to be its property, and to be subject to the management and control of the directory of the company. And any county subscribing to the stock of the company, as a matter of course, would become a stockholder and sharer in the business and profits of any and all the branches The right conferred to build branch roads, and thereby reach out over the State, grasp and draw to the main line, contributions of trade, freights and travel, would naturally be regarded as sources of strength, profit and wealth, and be a strong inducement for the County Court to subscribe to the capital stock of such a company. The 14th section, from which the very right of a county to subscribe at all, is claimed to be derived, indicates the legislative intent, when it provides that the Court may "take proper steps to protect the interest

and credit of the County Court; may appoint an agent to represent the county, vote for it, and receive its dividends." To protect the interest of the county and receive its dividends, in what? In one of the branches of the corporation? No. But as a stockholder in the *company*; for it is in the company alone the Court is authorized to subscribe stock; and it was as such stockholder it was authorized to "receive its dividends." The legislative intent is further most manifest from the careful provisions in the General Law of the State, in respect to these corporations. In Section 32, Chapter 39, Page 428, Vol. 1, Rev. Stat. 1855, and continued in subsequent statutes, it is declared that:

"For all such taxes, levied and collected for railroad purposes, the County Court shall cause to be issued and delivered to the persons paying such special tax, a certificate for the amounts thereof paid; and such certificate shall state the county and the railroad for which the tax was collected, and shall be transferable by the holders thereof, and convertible into stock of such railroad, whenever presented in amounts equal to one or more entire shares of the stock of such railroad. * * And * * said railroad company shall issue a certificate of stock to the person entitled thereto, or his legal representatives, for the number of full shares thus transferred."

On a subscription to the capital stock of the Clinton and Memphis Branch of the T. & N. R. R. Co., neither the county, nor the tax-payers holding tax receipts, would have any right to demand certificates of stock in the T. & N. R. R. Co.

This Court, in Marsh vs. Fulton County, 10 Wall., 682, says:

"The amendatory act of 1857, dividing the road into three divisions, and subjecting each division to the control and management of a different board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company, whose charter provided for a continuous line of railroad of two hundred and thirty miles, across the entire State, was voted by the electors of Fulton county; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value."

The evidence shows that no certificate of stock in the T. & N. R. R. Co. was ever issued to the county, demanded or expected, because all parties concerned drew just that conclusion, which is the logical deduction, not only from the facts and circumstances surrounding the mak-

ing of this subscription, but from the very terms of the act of 1868, under which it purports to have been made, that the subscription was to the stock of the Branch Road, and not to that of the T. & N. R. R. Co.

(*b*). The bond in question does not follow the subscription, and the plaintiff knew it when he took it, for he had seen and examined the order of subscription. The Judge and the Clerk who signed the bonds, were mere ministerial officers, to execute the order of the Court. If the agent's acts vary substantially from his authority, in nature, or extent, or degree, they are void as to the principal, and do not bind him.

Story on Agency, S., 165.
N. R. Bank vs. Agmar, 3 Hill, 262.
Mayor Little Rock vs. St. Bank, 3.
Eng. R. (Ark.), 227.
1 Mo., 205. 7 Mo., 419.

(*c*). The power given the County Court to make a subscription was not a self-executing act, and until the Court exercised the power, and made an order directing the subscription, the Presiding Justice and Clerk could not issue the bonds. The order of the Court, then, being the source of authority to the Presiding Justice and Clerk, the bonds issued by them, not in conformity to the order of the Court, are clearly unauthorized and void.

The County of Dallas in the State of Mo., P. E., vs. John W. McKenzie, D. E., Sup. Court U. S., No. 182, Oct. Term, 1876.

II.

Act of March 21, 1868.

It is claimed, and the order of the County Court, as well as the bond, recites, that the power to make the subscription in question, is, in part, derivable from an act of the General Assembly of the State of Missouri, entitled "An Act to aid the Building of Branch Railroads in the State of Missouri," approved March 21, 1868, which is as follows:

"Section 1. Any railroad company in this State, authorized by law to build branches, and wishing to avail themselves of the provisions

of this act, shall, by its board of directors, pass, and cause to be entered upon its records, a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line, and general course, a certified copy of which resolution shall be filed with the secretary of state, after which they shall be governed by the provisions of this act

Sec. 2. Whenever any such railroad company shall undertake the construction of a branch designated, as provided in the first section of this act, they shall receive donations or subscriptions to stock to aid in its construction in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from expenses on the main line. They may borrow money and issue bonds secured by mortgage on such branch road to aid in its construction, and, in general, may operate, lease, sell, or consolidate with any connecting road, distinct and separate from their main line, and in any other way may manage or dispose of such branch as by law they may be authorized, with reference to their main line, and separate therefrom.

Sec. 3. Any branch road so constructed shall not be holden for any debt, lien, or liability of the main line, nor shall the main line be holden for any debt, lien, or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.

Sec. 4. The holders of stock in any railroad company which was subscribed in aid of the construction of a branch road, according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; but in all matters directly and specially affecting the interests of such branch road, the stockholders in such branch shall control, and, for such purposes, the directors, under their by-laws may, or on the petition of parties representing one-tenth of such stock, shall, call a meeting of the stockholders in such branch, setting forth the object of such meeting; and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions, if not inconsistent with the laws of the state and the powers of such company.

Sec. 5. This act shall be in force and take effect from and after its passage.

Approved March 21, 1868.

This act does not, in strictness, authorize the subscription, as it was made in this case, for it only authorizes the railroad company desiring to build such branch, to receive donations and subscriptions to aid in its construction, in the name of such branch. The act thus expressly designating the company as the recipient of the subscription—constituting it a trustee for the Branch Road.

Conceding, however, that the power is conferred on the County Court by this act to make the subscription, as was done in this case, it is confronted with the demand of the 14th Section of the 11th Article of the State Constitution.

A brief review of the history of legislation in the State, in respect to subscriptions to railroad stocks, will enable the Court to see more clearly what was the true mark aimed at by this constitutional prohibition. About 1850-1-2 and 3, the State awoke as from a long sleep, seized with a spirit for internal improvements—manifesting itself in a zeal for railroads. The necessities of the State stimulated it, and gave it unusual scope. Counties were authorized, without stint, to lend their credit to these corporations. As early as 1855, the attention of the Legislature was directed to the expediency of throwing some check around a rapidly increasing spirit of extravagance. In Sec. 30, Chap. 39, Page 427, 1st Vol. Rev. Stat. 1855, it was provided that the "County Court or City Council subscribing, or proposing to subscribe, to such capital stock, may, for information, cause an election to be held, to ascertain the sense of the tax-payers of such county, etc."

But the railroad magnates, with their powerful lobby, proved yet strong enough to obtain from the Legislatures, special charters, exempting their corporations from the operation of this statute; and prospective road projects soon checkered the surface of the State, until the constantly accumulating taxes began to bear down so heavily on the shoulders of the people, that in the Legislature of 1859-60 the attention of the Legislature was imperiously demanded to be given to this growing evil. And on the 14th day of January, 1860, the Legislature adopted the following:

"That the sixth line of Section 30 of an act entitled, 'An Act to authorize the formation of Railroad Associations, and to regulate the same,' December 13, 1855, be, and the same is hereby, altered so as to read, 'shall, for information,' instead of 'may, for information.'" (Laws of Mo., 1859-60, Pg 88.)

Yet, notwithstanding this indication of a fixed determination of the Legislature to choke off the greedy cormorants, two days later, to-wit: January 16, 1860, the charter of the T. & N. R. R. Co. was obtained, and the power of the County Courts to subscribe to the capital stock

thereof, without a vote of the people, if secured at all, was effected, by covertly incorporating in the charter, by mere reference, the 8th section aforesaid of the Osage Valley and Southern Kansas Railroad. We pause here, for a moment only, to submit for the consideration of the Court, whether these two acts of January 14 and January 16, having been passed by the same Legislature almost cotemporaneously, in respect to the same subject matter, are not in *pari materia*; and whether the first, so clearly indicating the Legislative mind to require, in all cases, a vote of the people, does not apply to the charter of the T. & N. R. R. Co.?

Dwar. on Stat., 530.
Sedg. on Stat., 40.
8 Blackf., 361, 364, 365.
L. & D. R. R. Co. vs. Platte County, 42 Mo., 171.

Again, on the 23d day of March, 1861, the Legislature, to free from all ambiguity, and to throw further safeguards around the people, enacted—

"1st. That whenever the County Court of any county in this State, or the City Council of any city, shall be satisfied that the citizens of said county or city desire to subscribe to the capital stock of any railroad company, it shall be the duty of such County Court or City Council to order an election, to be held in said county or city * * * * giving at least thirty days' notice of the time and place of holding such election, by written or printed handbills posted up in each election precinct in such county or city, by the Sheriff or Marshal thereof; and if a majority of all the resident voters of said county or city, who are qualified to vote for county and State officers, and who shall vote at such election, shall cast their votes for subscribing said stock, then the County Court or City Council shall subscribe such stock to said road."

"2d. *It shall not be lawful for the County Court of any County* to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters who shall vote at such election, under the provisions of this act." Laws of Mo., 1860-1, Page 60.)

Even amid the miseries and confusions of civil war, the speculators in railroad projects, and jobbers in stocks, lost not sight of their object, nor ceased to follow their vocation.

In 1865, the people met, in their sovereign capacity, in convention, to re-arrange and re-organize the fundamental law of the State. They

at once addressed themselves to the subject and necessity of effectually checking the reckless extravagance and corruption of the County Courts and City Governments, in subscribing the people's money, and bringing ruin on communities, under the pretext of fostering railroad enterprises that had no other bottom or value than the *vellum* on which they were traced in the attractive art of the lithographer. So, in the 14th Section of the 11th Article of the Constitution, framed by them, they declared that—

"The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election, to be held therein, shall assent thereto."

Many of the remarkable and unusual features of this Constitution are doubtless familiar to this Court. With all its innovations, its cumbrous and complex machinery, its test oaths and pains and penalties, broad and sweeping, reaching even to the pulpit, and disrobing the ministry—reviewed and nullified in more than one instance by this Court, in the interest of public liberty and individual right—it yet received the sanction of the people at the polls; and on the 4th day of July, 1865, became the fundamental law of the State. No one provision so recommended it to the people as that contained in said 14th section. The people supposed that this section was all-comprehensive in its prohibition, retro-active as well as prospective in its operation.

But in October, 1867, the Supreme Court of the State, in State ex rel., Mo. & Miss. R. R. Co. vs. Macon Co., 41 Mo., 453, decided that this provision of the Constitution was only prospective in its action, and did not affect the provisions of charters granted prior to its adoption. This revived the hope of the speculators. And in the very next Legislature, convened after the promulgation of this decision, the railroad lobby encompassed that body, and on the 21st day of March, 1868, after extraordinary efforts and influences, procured the adoption of the act already quoted.

Adroitly drawn as this act is, it is not possible, we think, for this Court to say that a County Court can subscribe stock under its provisions without a compliance with the positive requirements of the Consti-

tution. If it can, it is a practical nullification of the said 14th section of the Constitution, and it will be the triumph of trickery over the supremacy of law. Such attempted evasions of constitutional provisions are familiar, and have often met with deserved rebuke from the courts.

The rule of construction in such cases is to inquire, what was the Constitution or law before making the one to be construed? Wherein was the old one defective? What is the remedy sought for in the new? And the Court will adopt that construction which will suppress the mischief, and advance the remedy.

Sedg. on Stat. and Const. Law, 235, 236.
Town of McGregor vs. Baylies, 19 Iowa, 43.

In Atkinson *et al*, vs. the M. & C. R. R. Co., 15 O., St. 21, 35, *et seq.*, Judge Ranney most ably discusses the attempted evasions, by legislative acts, of similar constitutional inhibitions. It was argued in that case, as in the one here at bar, that the act in question conferred no *new* power, but was in the nature of a law executing an existing right, simplifying and aiding its operation. He says, page 35:

"That the transaction assumed this *form* there is no doubt; but this does not relieve us from the necessity of inquiring what it was in substance. Constititutional provisions would be of little value if they could be evaded by a mere change of forms. These provisions of the Constitution are too explicit to admit of the least doubt, that they were intended to disable the General Assembly from either creating corporations or conferring upon them corporate powers, by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality, as to all future grants of power. * * * We must give such a construction to the Constitution as *will preserve its great leading objects intact.* To enable us to see clearly what the act has attempted to accomplish, and what it must have effectually accomplished to invest the Defendant with the capacities and powers of the old charter, it may be well to consider *what would have been their position if this act had not been passed?*"

"What the General Assembly cannot do directly, it cannot do indirectly."—Ibid, Page 37.

On page 38, he says:

"It is said these are not rights *newly* conferred, but simply declared as the result of the judicial sale. It will not do to deceive ourselves. * * * If they have it (*i. e.*, the power contended for), it must

have arisen in some way from the legal effect of the legislative enactment; and as, without the enactment they had it not, and with the enactment are invested with it, it would seem to follow that it was not only conferred by the enactment, but also *newly* conferred."

Apply this rule of unquestioned law to this case, and how can it stand the test? If we have succeeded, in the preceding part of this argument, in demonstrating that the subscription, in manner and form as it was made, was unauthorized by the charter of the T. & N. R. R. Co., then, if the power to make it comes from the act of 1868, it is *newly* conferred, and is, therefore, subject to the operation of Section 14, Article 11, of the Constitution. The powers of the T. & N. R. R. Co., so far as they relate to Branch Roads, was to "extend Branch Railroads into and through any counties the directors may deem advisable." There is in the charter no provision for a separate independent organization for a Branch Road; nor for subscribing to its stock; nor for separate stock therein; nor was there any general law providing for organizing Branch Roads; neither was there anything whatever in the charter indicating any purpose on the part of the Legislature to impart to the Branches the character of a distinct enterprise; but a Branch Road would have been under the control, not only of the directory of the main line, but the stock subscribed by any county through which the Branch might run, would be stock in the company, and the certificate therefor would entitle the holder to an interest in everything belonging to the company.

When, however, we recur to the act of 1868, it is apparent, not alone from the extraneous history of its creation, but upon the very face of it, that the powers and privileges thereby conferred are *new*, distinct, and *fundamental*. Its very title indicates that it is supplemental and additional to any preceding right. The first section is a confession that the railroad companies "authorized by law to build branches" might find in this act provisions of which they might wish to "avail themselves;" and it is presumptive evidence, that the company which should so avail itself, sought something which it could not find in its own charter. By the second section of this act, the company is, for the first time, authorized to—

"Receive donations or subscriptions to stock to aid in its (the Branch's) construction, *in the name of such Branch*, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such Branch shall be kept separate and distinct from expenses on the main line."

And by the remaining part of the section, qualities, privileges and powers are conferred in respect to the Branch Road, which make it an independent franchise, "distinct and separate from the main line."

By the third section, the Branch Road is exempted from all responsibility for any debt, lien, or liability of the main line: and the main line likewise for those of the Branches. The dividends and profits arising out of the business of the Branch Road are secured exclusively to the stockholders in the Branch, "and in all respects the interest of the stockholders in the Branch shall be kept separate and distinct from the interest of the stockholders in the main line."

And as conclusively illustrating that the real object of this act was to secure the construction of newly projected railroads, by taking shelter under the charters granted prior to the adoption of the new Constitution, and that they were to be Branches only in name, it is impudently asserted and provided in the 4th Section, that while the stockholders in the Branch are placed on an equality with those of the company in the choice of officers, yet, "in all matters directly and specially affecting the interests of such Branch Road, the stockholders in such Branch shall control;" and it winds up by authorizing the stockholders in the Branch to dictate to and *instruct* the board of directors in all matters relating especially to their interests, and enjoins that the directors "shall be governed by such instructions."

Thus may Leviathan swallow up the deep. Surely no railroad company, already authorized to build Branch Roads, would adopt as a part of its corporate household, a child who could thus shake its fists in the face of its *pater familias*, and dictate the terms and conditions of its conduct under the roof of its protector. The directors of a company who would, in good faith, do this, would not only be esteemed *felo de se*, and ought to have revived against them the old English law, forfeiting to the State their franchise, but should be subjected to the writ *de idiota inquirando*.

(*a*). The testimony of Mr. Newkirk, one of the Directors of the T. & N. R. R. Co., shows how the designation of this new railroad, projected from Kansas City, Missouri, to Memphis, Tennessee, as a Branch of the T. & N. R. R., was brought about. It was but a fraud to so call it a Branch, and was in exact accordance with the whole purpose and spirit of the act of 1868. Also, look at the caption of the order of the County Court of Henry county, making the subscription: "In the matter of the application of the Clinton and Memphis Branch, for a subscriptition to the capital stock of said Branch." It was not an application by the T. & N. R. R. Co., for the simple reason that it had no interest in the matter, and the County Court so understood it, for, in the very order of subscription, the Court makes it directly to the Branch, and appoints Joseph Hillegas to subscribe the stock, "in accordance with the terms of the foregoing order, and that he cause to be prepared and signed, the said coupon bonds of the County of Henry, and that the same be delivered only in accordance with the foregoing order."

And in the order of subscription itself, it is recited that it is made "in accordance with the resolution and orders of the Board of Directors of said Tebo and Neosho R. R. Co., establishing said *Branch* Railroad *Company*, and *authorizing subscriptions to the Capital Stock thereof*, adopted on the 6th day of June, 1870."

In pursuance thereof, the bonds were never delivered to the T. & N. R. R. Co., but were delivered to the President of the Branch Road, and his receipt taken therefor, which was afterward taken up by him, and a certificate of stock in the Branch Road given in its place. Mr. Stone, as such President, put the bonds upon market through his agent, Mr. Salmon, and Mr. Nicolay, the Plaintiff, knew who he was dealing with, and, through Mr. Stone, first took the opinion of counsel as to the validity of the transaction. And what is here developed in respect to the creation of this Branch Road, is true as to every other Branch Road in the State, brought into existence under the act of 1868. To call them Branches is a transparent fraud; and for the Courts to say that counties can become stockholders in them, without the consent of the people, expressed through the ballot box, is a mockery of the Constitution.

(*b.*) It may be claimed that the Supreme Court of the State has settled this question adversely to the position here assumed, in the cases of State vs. Sullivan Co., 51 Mo., p. 522, and State ex rel. vs. Greene Co. *et al*, 54 Mo., p. 550. In answer, we respectfully submit that the cases are not parallel with the case at bar, and if Judge Wagner did mean to go to the length claimed for his decisions, they are not the law, and are not binding on this Court.

This Court wil construe the act of 1868 for itself. It is not a case where the decision of a State Court is *res adjudicata*, and binding in this forum. For the question belongs to the domain of general jurisprudence. It involves commercial securities. Especially is this so where, as in the case at bar, the decision of the State Court is not the foundation or muniment of the plaintiff's title; for there had been no judicial construction of the act of 1868, when the Plaintiff's title accrued.

Jefferson Branch Bank vs. Skelly, 1 Black., 443.
Butz vs. City of Muscatine, 8 Wall., 582, 583.
Township of Pine Grove vs. Talcott, 19 Wall., 677-8.

Especially ought the Court to "score to the line" in a case like this, where a debt of two hundred thousand dollars is attempted to be saddled upon a community already taxed to the verge of ruin, and where these Branch Roads were never built—enterprises that were mere progenies of fraud, and abandoned in their bastard birth.

(*c.*) The case of State vs. Sullivan Co., *supra*, does not touch the real question at issue. The decision in that case related only to the power to subscribe to the stock of the road, to be used in building a Branch. There was no subscription under the act of 1868. And in State vs. Greene Co., it is apparent, from the whole reasoning of Judge Wagner, that he placed his decision on the fact that the power to make that subscription was independent of the act of 1868; for he says, page 550:

"If it can be shown that this proceeding is independent of that act, and does not depend upon it in any manner, then I think its validity must be upheld. If the act of 1868 substantially changes the charter of the company, or attempts to confer upon County Courts the power to make such subscriptions without first submitting the question to the qualified voters, then, as to such matters, I have no hesitation in

pronouncing it void. In other words, the act could not organize a new company, giving it such power, nor confer any additional power, without the vote of the people, where it did not previously exist."

His argument previous to that, was to show that, inasmuch as this identical so-called Branch, with its initial and terminal points, and general direction, was specifically provided for in the original charter, in addition to the general power conferred by the charter, to build Branch Roads, that no new power was necessary to be invoked under the act of 1868 to justify the character of subscription made by Greene county.

It does not appear, from the case as reported, that either the subscription, or the bonds issued thereunder, referred to the act of 1868 for their authorization; but it does appear that the subscription was made to the company to aid in building the Branch.

The case passed off on demurrer, and mainly on the effect of the consolidation involved therein. So far as it involved a discussion of the true character and construction of the act of 1868, the dissenting opinion of Vories, J., is unanswerable.

In Nugent vs. The Supervisors, 19 Wall., 251, this Court says, the American authorities uniformly assert that a subscriber for stock is released from his subscription by a subsequent alteration of the organization or purposes of the company, when such alteration is fundamental, and not provided for in the charter or the general laws of the State. We submit that the provisions of the act of 1868 are fundamental; and a subscription of the character therein provided for, was not contemplated by the charter, or any general law of the State, prior to the adoption of the Constitution of 1865.

III.

The Effect of the Sale of the T. & N. R. R. Co.

It was averred in the answer, and not denied in the replication, and established on the trial, that, after the T. & N. R R. Co. had adopted the resolution designating the Branch Roads, and *prior* to the issue of the bonds in question—

"The said T. & N. R. R. Co., pursuant to statute made and provided, by articles of agreement and sale, did sell and transfer all its

rights, franchises, and property to the M., K. & T. R'y Co., a corporation organized and existing under the laws of the State of Kansas; which was duly ratified and accepted by said M., K. & T. R'y Co., and was filed and entered of record in the office of the Secretary of State, as *by law provided*; that thereafter, the said T. & N. R. R. Co. passed to, and vested in said M., K. & T. R'y Co., and said T. & N. R. R. Co., south of the Pacific Railroad, ceased to exist as such; and the authority, if any, of said speculators, and committee claiming to act for and in behalf of said Branch Roads, so far as their authority therefor was claimed to emanate from the said T. & N. R. R. Co., was revoked and annulled; and the act of the said County Court, in so issuing said bonds and coupons, was unauthorized and nugatory; that the bonds were not issued or delivered to said M., K. & T. R'y Co., nor were the same ever delivered to it; nor has it ever had aught to do with said Branch Roads, or in any manner or form recognized their existence, but the same have ever been wholly independent, the one of the other." (See pages 13 and 14 of the printed Transcript of Record.)

We shall not controvert the doctrine laid down in Nugent vs. The Supervisors, 19 Wall., in respect to the effect on a subscription made to one railroad company, which afterwards consolidates with another company.

The question arising in the case at bar presents a new phase, and is *sui generis*. The subscription, on its face, is to the Clinton and Memphis Branch, and would not pass under a sale of the property of the T. & N. R. R. Co. Or, if it be viewed in the light of the recitation of the bond, as made under the act of March 21, 1868, and is, therefore, a subscription "to the T. & N. R. R. Co., to the use and in the name of C. & M. Branch," then the company, by the very terms of the subscription, and the act, was a *mere trustee*, to receive the subscription and apply it to the construction of the Branch Road. Such a trust, estate, or interest, would not pass under the deed of sale. The sale made by the T. & N. R. R. Co., and its abandonment of that part of its field, was in effect a surrender of its trust, and it could not, by any act of its own, devolve this trust, and its consequent responsibility, upon its grantee. This change was certainly material and fundamental. It may well be assumed that the County Court, in making said subscription, might repose a special confidence in the directory of the Company, not only as a safe custodian of the fund, but that they would diligently apply it to the construction of the

Branch Road; but the County Court might not so trust the directors of a foreign corporation.

And it is further to be observed, that, unlike the cases decided by this and the State Courts, the bonds here were not issued nor delivered to the new Company after the sale, but were issued and delivered to the Branch Road after the sale.

In Lowman vs. the Lebanon and R. R. Co., 30 Penn. St. Rep. 42–48, Lowrie, J., says:

"The Company so sold loses its actual identity, abandons its name, and therefore its legal identity, and its corporate existence, and can no longer claim any legal recognition."

Vide Harshman vs. Bates Co., 2 Otto., 574–575.

The only tenable ground on this aspect of the case for the Defendant in Error, is that taken by Wagner, J., in defending the consolidation in the Greene Co. case, 54 Mo., 552, *supra*. He says:

"In the present case, none of the property, or the rights and privileges of the Branch Railroad is extended to, or possessed by, the road with which it is consolidated. For all practical purposes it is really and essentially a distinct and independent branch. The union exists simply in name, but not in substance. An analysis of the act of 1868 abundantly shows this."

This argument is suicidal. In the struggle to escape the whirlpool of Charybdis, the learned Judge is dashed to pieces on Scylla. For, if it be "really and essentially a *distinct* and *independent branch*," and the union between it and the main line exists "in name but *not in substance*," what becomes of the other branch of the case, that the act of 1868 does not confer on the Branch Road any additional power or attributes not derived from the old charter?

Beyond all question, if this Branch Road, in fact and law, had been organized simply under the charter of the T. & N. R. R. Co., it would have passed to, and vested in, the M., K. & T. Ry. Co., by virtue of the said deed of sale.

(*d*). The Defendant in Error bought with notice of this conveyance of the T. & N. R. R. Co. The sale was in pursuance of the provisions of a public statute of the State, which provides that it shall be

complete when "a certificate thereof, signed by the President and Secretary of said Company shall have been filed in the office of the Secretary of State." (1 Vol. Wag. Stat., Sec. 57, Page 315.)

This filing was not essential to the validity of the sale, as between the contracting corporations. The contract, as between them, was consummate on the delivery of the deed. This requirement of the statute was for the notification and protection of the public.

Meth. Epis. Church vs. Picket, 19 N. Y., 485-486.

Leonardville Bank vs. Willard, 25 N. Y., 574-5.

Mokilumni Hill Man'g. Co. vs. Woodbury, 14 California, 424-6-7.

IV.

The Court, below, erred in refusing to sustain the motion in arrest of judgment. The petition does not, in the language of the Missouri practice act, which obtains in the United States Circuit Court, "state facts sufficient to constitute a cause of action," in that it wholly fails to aver by what authority the Henry County Court issued the bond declared on.

As County Courts have no authority to issue such obligations without an Enabling Act, the petition must allege, or show on its face, the law under which the bond was issued. This has been the ruling of the Circuit Judge since this case was tried, following the decision of Miller, J., in Thayer vs. Montgomery Co., in the Kansas District, June Term, 1874, Vol. 1, Central Law Jour., Page 365. Kennard vs. Cass Co., 3 Dil. Cir. Crt. R., 147–149.

The rule is well settled under the prac ice act of the State, that where no cause of action is stated in the petition, the defect is not cured by verdict, nor is the Defendant required to raise such objection by demurrer, or on the trial, but may take it on a motion in arrest of judgment. (Sec. 10, Art. 4, 2 Vol. Wag. Stat., Page 1015.)

Welsh vs. Bryan, 28 Mo., 31.

Ibid 337.

Even if the bond, which recites the authority under which it was

issued, were filed as an exhibit, with the petition, it would not cure the defect.

Deitz vs. Walde *et al.*, 35 Mo., 376–8.
Curry vs. Lucky, 35 Mo., 389.
Baker vs. Berry *et al.*, 37 Mo., 306.

Jas. O. Broadhead
Atty for Pltff
in Error

HENRY COUNTY,

Plaintiff in Error,

vs.

ALBERT H. NICOLAY,

Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA BAR ASSOCIATION

BRIEF OF

JAMES [illegible] EAD,

For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

HENRY COUNTY,

Plaintiff in Error,

vs.

ALBERT H. NICOLAY,

Defendant in Error.

STATEMENT.

This action is founded on coupons detached from bonds of which the following is a copy:

Henry County Bond. $1,000. *State of Missouri.*

Interest ten per cent. per annum, payable semi-annually on the first days of January and July.

Know all men by these presents that the County of Henry, in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo and Neosho Railroad Company, to the use and in the name of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, in the sum of one thousand dollars, which sum the said County hereby promises to pay to the Tebo and Neosho Railroad Company, or bearer, to aid

in building said branch railroad, at the National Park
39 Bank, in the city of New York, on the first day of January, 1881, together with interest thereon at the rate of ten per cent. per annum, which interest shall be paid semi-annually on the first days of July and January of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

This bond is issued under and in pursuance of an order of the county court of Henry County in the State of Missouri, and in pursuance of and by authority of an act of the general assembly of the State of Missouri, entitled, "An act to incorporate the Tebo and Neosho Railroad Company," approved January 16, 1860, and of an act of the general assembly of the State of Missouri, entitled, "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, A. D. 1868.

In testimony whereof, the said County of Henry has executed this bond, by the presiding justice of the county court of Henry County, under the order of said court, signing his name thereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing the seal of said court.

This done at the city of Clinton, County of Henry aforesaid, this first day of January, A. D. 1871.

[SEAL.] WILLIAM JENNINGS,

Presiding Justice of the County Court of Henry County.

Attest:

On the 6th of June, A. D. 1870, the directors of the "Tebo and Neosho Railroad Co." passes certain resolutions and orders, establishing what was called the "Clinton and

Memphis Branch of the Tebo and Neosho Railroad, and on the same day, June 6th, 1870, the same board of directors passed resolutions and orders, establishing another branch road called the Clinton and Kansas City Branch of the Tebo and Neosho Railroad."

These two sets of resolutions and orders of the Tebo and Neosho Railroad Company were adopted in pursuance of the provisions of an act of the general assembly of the State of Missouri, entitled, "An act to aid the building of branch railroads in the State of Missouri," approved March 21st, 1868, the first section of which act is as follows:

"§ 1. Any railroad company in this State, authorized by law to build branches, and wishing to avail themselves of the provisions of this act, shall, by its board of directors, pass and cause to be entered upon its records, a resolution setting forth such desire and designating the name under which such branch shall be built, its point of intersection with the main line and general course, a certified copy of which resolution shall be filed with the Secretary of State, after which they shall br governed by the provisions of this act."

On the 1st day of August, 1870, the county court of Henry County, on the application of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, authorizes a subscription on the part of the County of Henry, of fifteen hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad, each share being one hundred dollars, and on the same day authorized a subscription on the part of the county, of five hundred shares of the capital stock of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, providing in each order for the issue of the bonds of the county of the denomination

of one thousand dollars each, with interest coupons attached, to pay these subscriptions—in all $200,000 in bonds—the bonds to be dated January 1st, 1871,—see pp. 24 and 25 of record.

By the act of 1868, the branch road thus established, becomes a separate and distinct organization.

The 2nd section of this act provides, that when a railroad company acting under it, undertakes the construction of a branch road, subscriptions of stock shall be taken to aid in its construction, in the name of such branch, which shall be expressed in the certificate of stock issued, and the 3rd section of the act provides:

"§ 3. Any branch road so constructed shall not be holden for debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch. Any dividends or profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept distinct and separate from the interest of the stockholders of the main line."

But although thus kept separate and distinct for the benefit of those who have subscribed for the stock of the branch road, yet whatever property or right of way for the branch may have been acquired by the company, the original company is authorized to dispose of, "as by law they may be authorized in reference to the main line." See sec. 2, of Act of 1868.

On the 7th of November, 1870, the County Court issued an order for the issue of the bonds—in the mean time, and before the issue of the bonds, viz: on the 18th day of October, A. D. 1870, the Tebo and Neosho Railroad Company,

by the act of its stockholders, and in pursuance of the provisions of the law then in force, sold out to the "Missouri, Kansas and Texas Railway Company, a corporation organized under the laws of Kansas, all of its privileges, rights, powers, franchises, real estate, and other property, the whole or any part of which is in this State, excepting only such as belong to the extension of the Tebo and Neosho line north of Sedalia, via Booneville, Forsythe and Moberly to West Quincy." The above are the operative words of the conveyance, see p. 27 of the record—which contract of sale was filed in the office of the Secretary of State under the provisions of the general law of Missouri.

See 1 Wagner's Statutes, p. 315.

The Tebo and Neosho Railroad Company was incorporated by an act approved January 16, 1860 (see acts of 1860, p. 402) embodying as a part of its provisions, sections 8 to 22 inclusive, of the act incorporating the Osage Valley and Southern Kansas Railroad Company, approved November 21st, 1857. See Sess. Acts of 1857, p. 59. Adj'; Sepiem

The 14th section of the last named act declares that:

"It shall be lawful for the County Court of any County, in which any part of the route of said railroad may be, or any County adjacent thereto, to subscribe for the stock of the Company, * * * and for the stock subscribed, may issue the bonds of the County."

The 22nd section of the last named act provides:

"§ 22. None of the provisions of the first article of the act entitled 'An act concerning corporations,' shall apply to the Osage Valley and Southern Kansas Railroad Company (Tebo and Neosho Company), except sections *four, five, seventeen and twenty-three* of the said act. * * *"

The general law referred to is contained in the Revised Code of Missouri for 1855, Vol. 1, p. 369.

Section seven (7) of the first article of said general law is one of the sections which does not apply to the charter in question, because it is expressly excepted, that section reads as follows: "§ 7. The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature."

So that the power of *repeal or amendment* of the charter of the Tebo and Neosho Railroad, as well as of the Osage Valley and Southern Kansas Railroad is taken away from the Legislature.

By the 6th section of the charter of the Tebo and Neosho Railroad, the Company was authorized to survey, mark, locate, construct, maintain and operate a railrord, commencing at a point on the Pacific railroad, between the west bank of the Lamine river, and Muddy creek, in Pettis county, by the most direct and practical route, in a southerly, or southwesterly direction, through Henry county; thence to some point on the State line, between the northwest corner of Jasper county and the southeast corner of McDonald county, * * * and may extend branch railroads into and through any counties, that the Directors may deem advisable."

These are all the provisions of the laws of Missouri which are applicable to the questions involved in this case.

After the introduction of the testimony on the part of defendant, the plaintiff demurred to the evidence as insufficient to constitute a defence to the action. The court thereupon sustained the demurrer, and instructed the jury to find a verdict for the plaintiff, which was done and judgment rendered accordingly.

ERRORS ASSIGNED.

The defendant insists that the court erred:

1. In sustaining the demurrer to the evidence.

2. In instructing the jury to find for the plaintiff.

3. And the defendant particularly insists that the court erred in holding the law to be: that the County Court of Henry county had power or authority under the charter of the Tebo and Neosho Railroad Company to subscribe for the stock, or to issue the bonds in question, except in pursuance of a vote of the people, as provided by the 14th section of the 11th article of the Constitution of Missouri, requiring two-thirds of the qualified voters to authorize such an act; and defendant insists that the said acts of the County Court of Henry county were in violation of the Constitution of the State Missouri, and the court below erred in holding that said acts were valid and constitutional.

BRIEF.

I. The first question that presents itself is whether the subscription of stock as made was a valid, legal subscription, irrespective of the provisions of the act of the General Assembly of Missouri, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, 1868.

The subscription was for "*fifteen hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad.*" See p. 24 of the Record, for the order of the County Court authorizing said subscription, and the appointment of the agent to make the subscription. This certainly was not a subscription to the capital stock of

the Tebo and Neosho Railroad Company, and the authority of the Court given by the 14th section above quoted is to subscribe for the stock of the Company.

When a vote of the people is required, and a vote is given to subscribe for the stock of one company, there would be no authority to subscribe for the stock of another company. Such is the doctrine held by this Court, in the case of Marsh v. Fulton, 10 Wat., p. 682, and surely the authority to subscribe for one kind of stock does not give the authority to subscrlbe for another and quite a different kind of stock. The 14th section does not give any authority to subscribe to the stock of a branch road. It is true the charter authorizes the Company to build branch roads, and authorizes the County Court of any county through which the road or any of its branches may be to subscribe for the stock of the Tebo and Neosho Railroad Company, but that is quite a different thing. In such case the stock is for the use of the Tebo and Neosho Company, which owns a branch or has a branch running through the particular county. In such case the Company has the control and management of the stock, and the county holding the stock is interested as a stockholder in the whole road as well as the branch; but the subscription in this case is to the "capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railaoad," and made under the authority of the act of March 21st, 1868, and this act provides:

"§ 3. Any branch road so constructed shall not be holden for any debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch. Any dividends of profits arising out of the business of sueh branch road shall be divided among the stockholders

in said branch, and in all respects the interests of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line."

It is very evident that it was the intention of the Legislature to make two kinds of stockholders and two kinds of stock, neither set of stockholders to be entitled to share in the profits of the other. This certainly was not provided for nor authorized by the charter of the Tebo and Neosho Railroad Company.

The powers of the Company so far as they related to branch roads, is found in the last clause of the 6th section of the original charter, as follows:

"And may extend branch railroads into and through any counties the Directors may deem advisable."

There is no provision for a separate organization for a branch road, nor for separate stock for a branch road, nor was there any general law for organizing branch roads, nor was there in the original charter any special power to build a branch road by giving its commencement or general direction or terminus, so as to give it the character of a separate and distinct enterprise. If stock should be subscribed, it would be stock in the Company, and the certificate of stock would entitle the holder to an interest in everything belonging to the Company, and any dividends that might be made. It was only such a subscription that the County Court of Henry County was authorized to make.

The question presented in the case of the State v. Green County, 54 Mo., p. 540, which was referred to and the doctrine pronounced in that case sanctioned by this Court in the case of Scotland County v. Thomas, decided at the October term, 1876, was entirely a different one. In that

case the County Court of Green County *subscribed to the capital stock of the Hannibal and St. Joseph Railroad Company*, issued to aid in building and equipping the branch road, which ran through the county. The facts were that the "Kansas City, Galveston and Lake Superior Railroad Company" was chartered in 1857, with power to construct a certain branch railroad, and power was given to the County Court of any county through which the road or any of its branches might run, to subscribe to the stock of the company and issue bonds therefor. The company afterwards changed its name and then consolidated with the Hannibal and St. Joseph Railroad Company. This latter company continued the work which had been begun by the first company, and both courts held that upon consolidation all the rights and privileges of both companies passed to the consolidated company, and that therefore the power to make subscriptions to the stock of the consolidated company, and of the company to take such subscriptions belonged to the Hannibal and St. Joseph Railroad Company for the purpose of building the branch road, and this power was irrespective of any of the provisions of the act of March 21st, 1868. Indeed, the Judge delivering the opinion in the Green County case above referred to, says that if the act of 1868 was necessary to give validity to the subscription, the decision of the Court would have been different.

See State v. Green County, 54 Mo., p. 550.

The Court says: "If the act of 1868 substantially changes the character of the company or attempts to confer upon county courts the power to make subscriptions without first submitting the question to the qualified voters, then as to such matters I have no hesitation in pronouncing it void."

It is true that the bond sued on differs from the subscription in this: that it is an obligation to pay the "Tebo and Neosho Railroad Company or Bearer," to the use and in the name of the Clinton and Memphis Branch of the T. and N. R. R., but the County of Henry has no legal authority to make such a bond. The county has no authority *generally* to give bonds to railroad companies—it must be in payment of a subscription to the stock of the company, and this must appear, either from the bond itself or by an averment in the petition. This point has been well settled.

See Thayer v. Montgomery County, 3 Dillon, p. 389.

Opinion by Justice Miller: *

The authority is to issue bonds in *payment* of subscriptions to stock—not for any other purpose. It will not do to say that any bond made by the county, payable to bearer, is a bond for a railroad subscription; if so, there is no limit to the liability of the county. The recital that it is for a railroad subscription may be conclusive on the county, but there must be some such recital or proof, otherwise it does not come within the perview of the authority given by the law.

In this case the bond says nothing about the subscription —does not say whether it is given in payment of subscription to the capital stock of the company, or for rolling stock, and the order of the County Court for the subscription, and the subscription as actually made was to the "*capital stock of the Clinton and Memphis Branch of the Tebo and Neosho Railroad.*" Surely there is no authority to make such a subscription, because there is no such stock provided for by the charter. It is subject to different liabilities, and entitled to a different character of profits from the stock of the company provided for in the charter. A subscription

* See also County of Dallas v. Mc Kenzie, 4 Otto 660-

to the stock of the company would give the county an interest in a line running from the Pacific Road to the southern boundary of the State, whereas this subscription gives an interest in the branch road only. It may be a better thing but it is not the same thing.

II. But it may be said that the act of March 21st, 1868, was an amendment to the charter of the Tebo and Neosho Railroad, and to the charter of all roads in Missouri authorized to build branches.

We deny the authority to make amendments changing the scope of the original charter,—not only is the power to amend not reserved, but is expressly prohibited.

The charter of the Tebo and Neosho road expressiy adopts the 22nd section of the act incorporating the Osage Valley and Southern Kansas Railroad Company.

See Session Acts of Missouri of 1857, p, 59, and this 22nd section declares that:

"None of the provisions of the first article of the act entitled 'An act concerning corporations,' shall apply to the Osage Valley and Southern Kansas Railroad Company (Tebo and Neosho Company), except sections *four, five, seventeen and twenty-three* of the said act."

The company then, and its charter, are exempt from the operations of all the sections of the first article of the general corporation law, except sections *four* (4), *five* (5), *seventeen* (17) *and twenty-three of said act.*

§ 7 of the first article of the general corporation law of 1855, is one of the sections, from the operations of whose provisions the charter of the Tebo and Neosho Railroad Company is exempt— it provides:

§ 7. The charter of every corporation that shall hereafter

be granted by the Legislature, shall be subject to *alteration, suspension and repeal,* in the discretion of the Legislature.

The result is that the charter of this company is not subject to *alteration, suspension or repeal.* In the case of Scotland county vs. Thomas, where the power to amend existed, the court says:

"The power to amend thus existing, the amending acts in this case do not subvert the original purposes of the charter."

Much stress in that case was laid upon the power to amend—and so in the case of Callaway County vs. Foster, 3 Otto, p. 570, it was held in substance by this court—referring to the decision of the Supreme Court of Missouri, in the State of Missouri vs. Cape Girardeau State Line Railroad, 48 Mo., 468, that the constitutional prohibitions in the Missouri State Constitution did not extend to amendments of laws in force when it was adopted, but that additional power given to the Cape Girardeau Railroad, by means of an amendment to its charter, was a lawful exercise of authority, of course this would apply only to cases where amendments were not prohibited.

If then there was no authority given to the County Court of Henry County, under the charter of the Tebo and Neosho Railroad Co., to make a subscription to the stock of a branch road as such, without submitting the matter to a vote of the people, the power could not be given by a subsequent act of the Legislature, passed after the adoption of the constitution. The doctrine established by this court in the Callaway Co. case, 3 Otto, p. 570, and in the Scotland Co. case, were recently decided but not yet reported, is that under the Constitution of Missouri, the *changes* made in the charters of the railroad companies, whether by the act authorizing consoli-

dation into other companies, or other Acts of the Legislature passed since the adoption of the constitution, could only be sanctioned and held valid by reason of the fact that the constitution reserves to the Legislature the power to make amendments to existing laws and charters, whether such amendments were in conflict with the *general* prohibitions of the constitution or not, but from the very nature of the case there could be no such reservation in this case. The charter must stand as it was originally adopted, and if the power claimed could not be fairly deduced from its provisions, it does not exist at all.

JAS. O. BROADHEAD,
Att'y for Deft. in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

HENRY COUNTY,

Plaintiff in Error,

vs.

ALBERT H. NICOLAY,

Defendant in Error.

A. Comingo submits the following argument and authorities for plaintiff in error.

It is insisted that the bonds sued on in this cause are void.

They were issued without authority of law, and this fact appears on the face of the bonds, in as much as they recite the authority under which the court acted when it issued the securities, and do not show a compliance with, or even an attempt to comply with the requirements of the provisions of the law, which was indispensable as a condition precedent to the exercise of the power to subscribe the stock and issue the bonds.

The recital on the face of the bonds, to which attention is invited, is as follows: *This bond is issued under and in pursuance of an order of the County Court of Henry County,*

in the State of Missouri, and in pursuance of and by authority of an act of the General Assembly of the State of Missouri, entitled an Act to incorporate the T. & N. R. Co., approved January 16th, 1860, *and an Act of the General Assembly of the State of Missouri, entitled an Act to aid in the building of branch railroads in the State of Missouri, approved March 21st, A. D.* 1868.

The only power, therefore, under which the court acted, or could act, in making the subscription, and issuing the bonds, according to this recital, is found in the two acts recited; and it is submitted that the power as exercised, is not found alone in either or both of said acts, even if it is not in any manner limited or effected by other antecedent legislation, nor by section 14, article 11 of the Constitution of the State, adopted in 1865; to which reference will be hereafter made.

It is also submitted, that the power to subscribe stock and issue the bonds of the County in payment thereof is limited by the provisions of said section of the Constitution, and by legislation antecedent to the act of January, 1860, referred to in the bonds.

The two acts recited, or referred to in the bonds, or the material parts of them, are as follows:

It shall be lawful for the County Court of any County in which any part of the route of said railroad or branches may be, or any County adjacent thereto, to subscribe to the *stock of the Company*, or invest its three per cent. fund, or other improvement fund belonging to the County, as stock in said railroad; *and for the stock subscribed in behalf of the County may issue the bonds of the County, to raise the funds to pay the same.*

Dividends of so much of the profits of said company as

shall appear advisable to the directors, shall be declared semi-annually, and be paid to the stockholders or their legal representatives, on application at the office of said company, at any time after ten days from the time of declaring the same. [Sections 14 and 15 of act incorporating Osage Valley and Southern Kansas R. Co., re-enacted in the act incorporating the T. and N. Railroad. Session acts 1859–60, page 404 sect. 8.]

The act of March 21st, 1868, referred to in the bonds, is as follows:

SEC. 1. Any railroad company in this state, authorized by law to build branches, and wishing to avail themselves of the provisions of this act shall by its board of directors pass and cause to be entered upon its records a resolution setting forth such desire, and designating the name under which such branch shall be built, its point of intersection with its main line and general course, a certified copy of which resolution shall be filed with the Secretary of State, after which they shall be governed by the provisions of this act.

Sec. 2. Whenever any such railroad company shall undertake the construction of a branch, designated as provided in the first section of this act, they shall receive donations or subscriptions to stock to aid in its construction *in the name of such branch, which shall be expressed in the certificate of stock issued; the cost and expenses of constructing and operating such branch shall be kept separate and distinct from the expenses of the main line.* They may borrow money and issue bonds secured by mortgage on such branch road, to aid in its construction, *and, in general, may operate, lease, sell or consolidate with any connecting road, distinct and separate from their main line,* and in any other way may manage or

dispose of such branch as by law they may be authorized with reference to their main line and separate therefrom.

Sec. 3. Any branch road so constructed *shall not be holden for any debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch. Any dividends of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interest of the stockholders in the branch shall be kept separate and distinct from the interests of the stockholders in the main line.*

Sec. 4. The holders of stock in any railroad company which was subscribed in and of the construction of a branch road, according to the provisions of this act, shall have the same rights as other stockholders in the company in the choice of officers; *but in all matters directly and specially affecting the interests of such branch road, the stockholders in such branch shall control,* and, for such purpose, the directors under their by-laws may, or on the petition of parties representing one-tenth of such stock, shall call a meeting of the stockholders in such branch, setting forth the object of such meeting; *and at any such meeting such stockholders may instruct the board of directors in all matters relating especially to their interests, and they shall be governed by such instructions* if not consistent with the laws of the State and the powers of such company.

[Session acts of 1868, pages 90, 91.]

Leaving out of view, for the present, the fact that the so-called "Clinton and Memphis Branch of the Tebo and Neosho Railroad, is not a branch of said road, never was and never can be, the inquiry arises, how much of the power exercised by the County Court in making the subscription of stock and

issuing the bonds in controversy, is derived from the first, and how much from the last of these acts? It is not wholly derived from either of them. This is manifest from the fact that the utmost extent of the power conferred by the charter of the T. & N. Railroad Co, on county courts, is to subscribe to the *stock of said company*, and issue the bonds of the county to raise the funds to pay such stock. Such is not the power the County Court exercised, or attempted to exercise. It did not subscribe to the capital stock of the T. & N. Railroad Co., and did not issue bonds of the county to raise funds or purporting to raise funds to pay such stock. The recitals in the bonds show that the subscription was made and the securities, the bonds of the county, issued for another and different purpose; and that the county acquired thereby none of the rights, privileges and benefits of stockholders in said Tebo and Neosho Railroad, that are provided for and secured by section 14 above quoted.

The subscription was made and the bonds of the county were issued to the Tebo and Neosho Railroad Company, "to the use and in the name of the Clinton and Memphis Branch, and solely to aid in the building of said branch road." In effect, and almost in express terms, these bonds are made payable to said company as trustee; and the proceeds arising therefrom are to be held and used by said company in trust for the use and benefit of said so-called branch road, or, practically, independent company.

That such is the character of this merely nominal branch road cannot be questioned; the cost and expense of its construction and of operating it, are separate from and independent of the main line; the profits arising out of its business, had it been built, were to be kept separate from those of the main line, and to be divided among, and only among, its stockholders.

Furthermore they could not share in the profits of the main line, and the interests and liabilities of the stockholders in the two organizations were in all respects, distinct from and independent of each other, as much so as are the interests of any other independent railroad companies in the State, except that the directors of the T. & N. Railroad Company, under the direction of the stockholders in the branch road and subject to their control, and not otherwise, might perform certain offices; and that the stockholders in the branch road might vote at an election of officers for the main line.

The extraordinary powers exercised by the County Court in making the subscription, and issuing the bonds in controversy in this cause, cannot therefore be found in the act of January 14th, 1860. The action of the Court is not independent of the act of March 21st, 1868, but is clearly unauthorized and void without it.

In order to illustrate this proposition, let it be supposed that the County Court had issued the bonds in controversy, in the absence of such authority as is contained in the act of 1868, but containing substantially such conditions and limitations as are embraced in said act, and, by reference to it, in these bonds. They would then read about as follows:

The County of Henry, in the State of Missouri, acknowledges itself indebted to the Tebo and Neosho R. R. Co., as trustee, to the use, for the benefit and in the name of the Clinton and Memphis Branch of said T. and N. R. R., in the sum of $150,000, which said County promises to pay to said T. and N. R. R. Co., or bearer, to aid in building said branch road, &c.

This bond is issued under and in pursuance of an order of the County Court, &c., and in pursuance and by authority of

an act incorporating the T. and N. Railroad Company, approved January 16th, 1860. And it is hereby agreed that said County shall not by virtue of said subscription, &c., become a stockholder in said T. and N. R. R. Co., nor share in any division of its profits, but shall become a stockholder in the stock of said branch, and may share in the profits arising from its business; that said branch road shall not be holden for any debt, lien or liability of the main line, nor shall the main line be holden for any debt, lien or liability of such branch; and that said main line and branch road shall in all respects be distinct from and independent of each other, &c.

In testimony whereof, &c., &c.

Such, it is insisted, is the tenor and effect of the bonds in controversy. If issued under the act of January 16th alone, their validity no one would maintain.

It follows, therefore, that the act of March 21st must be invoked, in order to give even a color of validity to these securities.

The power to subscribe stock to and in the construction of this branch, is not, as already stated, conferred by the charter of the T. and N. R. Co., but the Legislature does attempt to confer it in the second section of the act of the 21st of March, 1868.

"Whenever any such railroad company shall undertake the construction of a branch, designated as provided in the first section of this act, they shall receive donations or subscriptions to stock to aid in its construction, in the name of such branch which shall be expressed in the certificate of stock." [Page 91, acts of 1868.]

No such power existed prior to the passage of this act;

and it, in effect, authorizes the organization of independent railroad companies, and by a subtle indirection undertakes to exempt them from the limitations and restrictions imposed by the fourteenth section of the eleventh article of the constitution of the State. This the law will not permit.

"The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." [Sect. 14, art. 11, Const. Mo.] Inasmuch as no such election was held, the power to subscribe for stock did not exist.

But, as has been shown, the only power conferred on county courts by the charter of the T. and N. R. Co., is to subscribe to or for the *stock* of said *company*, and to issue county bonds to raise funds to pay such subscriptions. They are not thereby authorized to subscribe for stock, or issue bonds for any other purpose. Whence, then, do they derive the power to subscribe for stock in the branch road? Or whence comes the power to subscribe for such stock, and issue county bonds to the T. and N. R. Co. as a trustee, to raise funds to pay for it? It isn't found, I repeat, in the charter, nor in the act of March 21, nor in both combined. The latter act simply provides that railroad companies may receive subscriptions of stock to aid in the construction of what its authors erroneously, if not craftily, denominate branch roads; but it does not authorize county courts to issue county bonds to raise funds to pay for the stock thus subscribed. The authority or power exercised by the county court in issuing these bonds cannot be deduced from these

two acts, nor can it be from any other law or laws of the State.

But admitting, for sake of argument, that a reasonable construction of these acts discloses the existence of the powers above denied, the question arises, how many of them are derived from the one and many from the other? In reply, I insist that most of them originate in the act of March 21st. The power to issue the bonds to the T. & N. Railroad Co. as a trustee, must be deduced from the charter alone, and all the others, from the act of 1868. Under and in pursuance of that act the stock in the branch road was subscribed for; the T. & N. R. Co. was constituted a trustee; the so-called branch road was projected, and was to be operated; the main line was exempted from all debts, liens and liabilities of the branch; the branch was denied any interest in, or privileges upon, the main line; the stockholders in the branch road were excluded from any and all dividends of profits arising from the business of the main line; and, in a word, under that act, and that act alone, was it possible to construct or attempt to construct, said branch road; all of which is apparent on the face of each bond.

It is submitted, therefore, that the County Court had no power or authority to make the subscription for stock in said branch road, and issue the bonds in question without permission from two-thirds of the qualified voters of the county, given in the manner indicated in the constitution.

The case of the State ex rel, &c. vs. Green County, 54 Mo. Reports, 540, has been cited, and is much relied upon, as an authority that supports the position of the defendant in error, but by a careful analysis of the facts in that case, and of the opinion of the court, it will be discovered that the conclusions

drawn therefrom are not warranted; and furthermore, that it is an authority that supports the position of the plaintiff in error.

The effect of the decision in that case, and indeed, the effect of all the cases that can be regarded as of any authority in this, is that the limitation imposed by 14th section of the 11th article of the constitution, is a limitation on the future power of the Legislature; that it has no application to pre-existing laws, and does not forbid the exercise of powers thereby conferred. It follows, therefore, that if the powers exercised by the County Court in making the subscription and issuing the bonds, as issued in the case under consideration, are not conferred by the terms of the charter of the T. & N. R. Co., the constitutional provision limits and controls their exercise. In State ex rel vs. Macon County Court, 41 Mo., 457.

In the State vs. Saline County, 51 Mo., 360, Justice Bliss (page 385) uses the following language: "But in the present case, the County Court of Saline County, until the act of 1868, had no right to make any subscription of this kind. That amendment (to the charter) granted a power which did not before exist, and the grant is necessarily subject to all the conditions there imposed by law. It was a new grant and it does not matter whether it gave a right to build a new branch of an old road, or an extension of the same, or one altogether new. The restriction is upon the legislative power and the charter of the road cuts no figure."

The Green County case, supra, is in perfect accord with this. The facts in that case may be briefly stated. The subscription to pay which the bonds in controversy in that cause had been issued, was made to the Hannibal and St. Joseph R. Co., to and in construction of a branch road known as the Kansas City and Memphis Railroad.

On the 9th of February, 1857, the Legislature chartered the Kansas City, Galveston and Lake Superior Railroad Company. In the 15th section of the act of incorporation, the power is conferred on County Courts to subscribe to the stock of said company. A general power is given by the provisions of the 7th section to extend branch railroads to any point in any of the counties through which the main line might be located; which is substantially the same as is given to the T. & N. R. Co., by the 6th section of its charter. But by the 13th section of the act incorporating the K. C., G. & Lake Superior R. Co., express power is given to construct the branch road known as the Kansas City and Memphis railroad, to which the Green County subscription was made. It provides that "said company shall have full power to construct a branch railroad, commencing at or near the city of Kansas, to any point on the southern boundary of the State, the directors may select, to connect with any road or roads, leading to or in the direction of the city of Memphis, in Tenessee, or Napoleon, in the State of Arkansas; and shall be governed in all respects, by the provisions of this act in the construction and operation of said branch road." Acts 1857, page 166.

In 1864 the name of the K. C., G. and L. S. R. Co. was changed to, and was thereafter known as the Kansas City and Cameron Railroad Co. The company under its new name retained all the rights, privileges and franchises that existed and were enjoyed under the charter of the K. C., G. and L. S. R. Co. By an act of the Legislature, approved March 11th, 1867, said Kansas City and Cameron Railroad Co. was authorized to consolidate with any other railroad company; and in 1870, in pursuance of said act, it did

consolidate with the H. and St. Joseph R. Co., to which the subscription was made as before stated. By virtue of this consolidation the latter company became the owners, and were possessed of all the rights, property, privileges, immunities and franchises which K. C. and C. R. Co. had by virtue of the charter of the Kansas City, Galveston and Lake Superior Railroad Co., and the several acts amendatory thereof.

Prior to the consolidation of these companies, the K. C. and Cameron R. Co. had resolved to build the branch railroad authorized by section 13 in the charter of the K. C., G. and L. S. R. Co., and had provided that the name of said branch should be the Kansas City and Memphis Railroad. This was done, or attempted, under the provisions of said charter and the amendments thereof, and also under said act of March 21st, 1868. After the consolidation, the H. and St. J. R. Co. by appropriate resolutions confirmed and approved the prior action of the K. C. and C. R. Co., and resolved to continue the work theretofore begun by the latter, and opened books for the subscription of stock to aid in building and equipping said branch road.

The points of difference between this case and the one under consideration are manifest and important. The act incorporating the K. C., G. and L. S. R. Co. was passed in 1857; it confers on county courts the power to subscribe to the stock of the company without taking a vote of the people, or of the tax payers, and it gives the power in direct terms to construct the branch road to the stock of which Green County had subscribed, and it provides that in the construction and operation of said branch road, the company shall, in all things, be governed by the provisions of that act.

In delivering the opinion of the court, Justice Wagoner

places much stress on these facts. He says (page 550) "The legislative enactments above cited, show that the original charter of the Kansas City, Galveston and Lake Superior R. R. Co. gave the power in direct terms to construct the branch road out of which this suit sprang; that it described its beginning point and terminus, &c." In the next paragraph he adds, "The proposition is undoubted, that under the original charter and the amendments thereto, prior to the acts of 1868, it was lawful for the County Court to make subscriptions. And if it can be shown that this proceeding is independent of that act, and does not depend upon it in any manner for its exercise, then I think its validity must be upheld."

This language cannot be misunderstood. It can have but one meaning, and that is, that all the power that was exercised, and all that was requisite in making said subscription and issuing the bonds in controversy in that cause, was found in the original charter of the K. C., G. and Lake Superior Railroad Company; and that although the recitals in the bonds showed that the court supposed it was acting in part, under and in pursuance of the general law of March 21st, 1868, it was not; and the erroneous recital to that effect did not impair the validity of the securities; or in other words, as the power existed independent of the act of 1868, the recital of that act in the bonds did not destroy their validity.

It necessarily follows, therefore, that unless it can be shown that the subscription of stock, as made by the County Court in this case, and the issuing of the bonds to pay it, was the exercise of powers confirmed by the act of January, 1860, *alone*, and wholly independent of the act of 1868, the validity of said securities must be denied.

That these powers were not conferred by that act does not admit of controversy. The nature and extent of the powers thereby conferred have already been indicated, so far as material to the questions involved in this cause. Giving to the language of the charter, whereby the express powers are conferred, the most liberal construction it can receive, and granting the use of all the incidental or implied powers that might rightfully be exercised in connection with the express, it is impossible to find authority to support the action of the court, independent of the act of March 21st. In that act alone is found authority, if such authority existed, for the court to subscribe for stock in the so-called branch road, or to subscribe to the T. and N. R. Co. as a trustee; or to use the people's money in paying for stock in a branch road, denying them the privileges and benefits of stockholders in the main line; or to issue county bonds to pay for stock subscribed to the pretended branch road, or hybrid organization, company or corporation.

Furthermore it is under and by virtue of that act only, that such an organization could be formed, and that the so-called branch road could be located and constructed, as was attempted. It could not have been done in that manner under the general power to construct branches, as conferred in section 6 of the charter. The charter of the K. C., G. and Lake Superior R. Co. contains the same general authority to build branches, that is contained in said section; but the Green County subscription was upheld, as we have seen, by reason, or chiefly by reason of the provisions contained in section 13 of the act incorporating the company to which it was made.

It is submitted as a correct rule, and one of general

application, that any reasonable doubt concerning the existence of a power exercised by a corporation, will be resolved against the corporation, and the power denied. Also that courts will, in determining the existence and extent of powers, adopt a strict rather than a liberal construction.

Minturn vs. Larne, 23 How., (U. S. 435-6.)
Thompson vs. Lee County, 3 Wall., 320.
Thomas vs. Richmond, 12 Wall., 349.
Clark vs. Davenport, 14 Iowa, 495.
Merriam vs. Moody's Ex'rs, 25 Iowa, 163.
Leonard vs. Canton, 35 Miss., 189.
Bank vs. Chilicothe, 7 Ohio, part 2d, 31x.
Collins vs. Hatch, 18 Ohio, 523.
Willard vs. Killingworth, 8 Conn., 247.

These general rules applied to the acts conferring on County Courts the power to subscribe to the stock of the T. & N. R. Co., and issue bonds to pay such subscriptions, and empowering said company to receive such subscriptions and bonds, are, in view of the facts appearing of record, it is respectfully submitted decisive of this case.

There is, however, yet another view of the case which I desire to present, and urge upon the attention of the court, inasmuch as it is in no manner inconsistent with the foregoing, and is independent of most of the positions there assumed.

It is submitted that even if it can be determined that the action of the County Court was independent of the act of 1868, "and did not depend upon it in any manner," or did not necessarily depend upon it, the making of the subscription was unauthorized by the laws of the State, and the bonds issued by the County Court are void.

The act incorporating the Tebo and Neosho Railroad Co., it must be remembered, was passed on the 16th of January, 1860. It simply confers on County Courts the power to subscribe to or for stock in said company, and to issue county bonds to raise funds to pay for stock thus subscribed; or, more properly, these are the only powers concerning the exercise of which we are now inquiring.

As before remarked, the utmost effect in the various decisions that have been made, touching this question, is that neither an amendment of the Constitution, nor a legislative enactment, subsequent to an act of incorporation, will take away or in any manner interfere with the exercise of powers and privileges contained in such charter. The powers that have thus been conferred on courts and municipalities, have been termed "privileges to corporations;" and although this is a dangerous and apparently absurd doctrine, we may, without prejudice to the interests of the plaintiff in error, give it full force, so far as relates to the view we are now presenting.

The history of legislation in the State of Missouri, with reference to the subscription to stock in railroad companies, by counties, cities and towns, shows a disposition and tendency since 1855, at least to impose limitations on the exercise of this dangerous power.

Prior to that time numerous charters had been granted to railroad companies, and in most of them, if not all, power was given to counties to subscribe to the stock of the companies thereby organized.

By an act approved December 13th, 1855, [Rev. 1855, page 427, sect. 30] County Courts are authorized to subscribe to the capital stock of any railroad company, organized under

that or any other act. It is also provided in said section that any county subscribing or proposing to subscribe to such capital stock, *might* cause an election to be held, to ascertain the sense of the taxpayer, as to the making of such subscription, and as to the mode of its payment, whether by the issue of county bonds or by taxation.

On the 14th of January, 1860, two days before the passage of the act incorporating the Tebo and Neosho R. Co., the act of Dec. 13, was amended [acts 1860, page 88] in such manner as to make it read as follows:

"It shall be lawful for the county court of any county or the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this or any other act in this state; and the county court or city council subscribing, or proposing to subscribe for such capital stock *shall* for information, cause an election to be held to ascertain the sense of the tax payers of such county or city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation." This legislation being prior to the adoption of the charter of the T. and N. R. Co., does not come within the rule laid down in the adjudicated cases. The effect of this statute is to declare that it shall not be lawful for the county court of any county to subscribe to the capital stock of any company thereafter organized, without first taking a vote to ascertain the wishes of the tax payers as to the making of a subscription, and as to the mode of payment, should they by their votes decide in favor of subscribing.

Referring again to the provisions of the charter, we find that it simply declares it shall be lawful for county courts to subscribe to the capital stock of the company. This they

could have done under the provisions of the general law. No reason appears for exempting this new corporation from the limitations imposed by that law; and if it had been intended to confer upon it the extraordinary powers claimed, without limitation as to their exercise, such intention would have been unequivocally expressed. It is unreasonable to suppose that the Legislature would on the 14th day of the month impose on all corporations the wholesome and much needed restraint and limitation contained in the general law, and on the 16th of the same month would create another of these soulless bodies, with full power to perpetrate the frauds, the then very recent legislation was calculated and intended to prevent.

The constitutional provision and the legislative enactments that have been passed upon by the Supreme Court of Missouri, have been declared prospective only, as we have seen. Should it now be held that the provisions of the general law as amended on the 14th, were repealed by a special law of the 16th of the same month, the fable of the lamb and the wolf at the brook, would aptly illustrate the helpless condition of the people who have been victimized and despoiled by means of subtle legislation.

But it is submitted that these two laws are not repugnant to each other, but are in perfect accord and can and must be construed together. They are in part materia, and the rules of construction in such cases, need not be stated.

There is no difficulty in construing these statutes together, as required by the universal rule of construction. That the amendment limited and was intended to limit the power of subscription to the stock of railroad companies, cannot be questioned; and that the powers conferred on County Courts

by the charter of the T. & N. R. Co., were subordinate to and that it was intended they should be exercised in subordination to the provisions of the general law, as amended, appears equally clear. This conclusion cannot be escaped, except by holding that they are repugnant, and that the latter in effect repeals the former.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 37.

THE COUNTY OF HENRY, PLAINTIFF IN ERROR,

vs.

ALBERT H. NICOLAY, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

OCTOBER TERM, 1877.

BRIEF FOR THE DEFENDANT IN ERROR, ALBERT H. NICOLAY, BY JAMES & W. M. GRANT.

FILED OCTOBER , 1877.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 37.

THE COUNTY OF HENRY,
Plaintiff in Error.
vs.
ALBERT H. NICOLAY,
Defendant in Error.

ERROR TO CIRCUIT COURT FOR WESTERN DISTRICT OF MISSOURI.

Brief for the Plaintiff in Error, by J. & W. M. Grant.

STATEMENT OF THE PLEADINGS.

The defendant in error, Nicolay, a citizen of New York, brought this suit in the Court below, to recover the interest due on certain bonds, of which the following is a copy in record, page 17:

"Henry County Bond. $1,000. State of Misssouri. Interest ten per cent. per annum, payable semi-annually, on the first days of January and July.

"Know all men by these presents, that the County of Henry, in the State of Missouri, acknowledges itself indebted and firmly bound to the Tebo & Neosho Railroad Company, to the use, and in the name of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the Tebo & Neosho Railroad Company or bearer, to aid in building said Branch Railroad, at the National Park Bank, in the City of New York, on the 1st day of January, 1881, together with interest thereon at the rate of ten per cent. per annum, which interest shall be paid semi-annually, on the first days of July and January, of each year, on the presentation and delivery at said bank of the coupons hereto severally subjoined.

"This bond is issued under and in pursuance of an order of the County Court of Henry County, in the State of Missouri, and in pursuance of and by authority of an act of the General Assembly of the State of Missouri, entitled, 'An act to incorporate the Tebo & Neosho Railroad Company,' approved January 16, 1860, and of an act of the General Assembly of the State of Missouri, entitled, 'An act to aid in the building of Branch Railroads in the State of Missouri,' approved March 21, A. D., 1868. In testimony whereof the said County of Henry," etc. (See Record, pages 17 and 18.)

The defendant pleaded several pleas in bar, (see Record pages 11 and 12), of which only the following are material:

"1. After admitting the issue of the bonds, that they were issued, without authority of law or consent of the defendant, were fraudulent and void, and that the Justice and Clerk had no authority to issue the same, except as directed by the County Court.

This plea was simply matter of law and not of fact.

"2. That the County Court never ordered the Clerk and Justice to issue the bonds to the Tebo & Neosho Railroad Company, to the use and in the name of Clinton & Memphis Branch.

"3. That certain scheming speculators in 1870 conceived a project of building a railroad from Kansas City towards Memphis, and being wholly dependent for the prosecution of their enterprise upon money to be obtained from the counties along the line of the projected road, and to avoid the provisions of the 14th Section of 11th Article, of the Constitution of the State of Missouri, which prohibits the County of Henry from being a stockholder in any corporation, unless two-thirds of the qualified voters should at a regular or special election assent thereto, they, the said speculators, conceiving the idea of denominating this projected road a branch of the Tebo & Neosho Railroad, to enable them by a dual management to obtain from Henry and other counties subscriptions to aid said enterprise without the vote of the people, as required by the Constitution; and that they designated that part of the road northeast of Clinton, as the Clinton & Memphis Branch, and that part southwest as the

Clinton & Kansas City Branch of the Tebo & Neosho Railroad, assuming and asserting that said branches were organized according to the provisions of the Charter of the Tebo & Neosho Railroad Company, and the Act of 21st March, 1868, in relation to Branch Railroads. That in June, 1870, the Directors of the Tebo & Neosho Railroad Co. had knowledge of these facts, and connived at the fraudulent design, with the appearance that the object was to enable said speculators to obtain aid to build said roads, without the assent of the people, and with distinct understanding that they were to be separate and independent roads, and that the speculators without the solicitation, knowledge or consent of the Tebo & Neosho Company, obtained from the County Court the order and agreement to subscribe for stock in said Branch and issued said bonds, wnich order is set out on pages 23 and 33 of the Record, as follows:

EXHIBIT A.

"At a regular term of the Henry County Court, begun and held at the court-house, in the town of Clinton, on Monday, the 1st day of August, 1870, the following, among other proceedings, was had on Thursday, the 4th day of August, 1870, it being the fourth day of said term:

In the matter of the application of Clinton and Memphis Branch of the Tebo & Neosho Railroad for a subscription to the capital stock of said Branch Road, from the County of Henry, to aid in the construction of said Branch Road.

The Court, after due consideration, being fully satisfied that the resources of the County will be materially enlarged, and that additional and profitable markets will be opened to the people of the County by the buliding of said Branch Railroad, it is considered, ordered and adjudged by the Court, that the County of Henry, in the State of Missouri, do subscribe for and agree to take one thousand five hundred shares of the capital stock of the Clinton and Memphis Branch of the Tebo & Neosho Railroad, each share being of the denomination of one hundred dollars, and amounting, in the aggregate, to the sum of one hundred and fifty thousand dollars, under and by virtue of the authority in the charter of the Tebo &

Neosho Railroad Company contained, and under the act of the General Assembly of the State of Missouri, entitled "An act to aid the building of Branch Railroads in the State of Missouri," approved March 21, A. D., 1868, and in accordance with the resolution and orders of the Board of Directors of said Tebo and Neosho Railroad Company, establishing said Branch Railroad Company and authorizing subscriptions to the capital stock thereof, adopted on the 6th day of June, 1870, the said capital stock to be paid for by the issue and delivery to the committee appointed to construct said Branch Road, of the coupon-bonds of the County of Henry of the denomination of one thousand dollars each, bearing date the 1st day of January, A. D. 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the City of New York, at which place the principal of said bonds shall also be payable ten years after the date thereof; the said bonds to be signed by the presiding Justice of this Court, and attested by the Clerk of this Court under the seal thereof, and the coupons to be signed by said Clerk; the said subscription being made, however, upon the following express conditions, viz:

1st. That the said Branch Railroad shall be located from a point within or near the corporate limits of the town of Clinton, and thence to the southern limits of the County of Henry, in the general direction of Osceola, in the County of St. Clair, and in the general direction of Memphis, in the State of Tennessee.

2d. That the proceeds of said bonds shall be applied to and expended in the construction of said Branch Railroad within the limits of the County of Henry, southwardly from Clinton.

3d. That none of the bonds aforesaid shall be issued and delivered, as aforesaid, until the grading and masonry upon that portion of said Branch Road lying within the limits of Henry County shall have been let by contract to responsible persons, and the Court shall be reasonably satisfied of the responsibility of such persons.

4th. That all the coupons for interest which shall have matured, or which would have matured had the said bonds been is-

sued and delivered by such letting or lettings by contract, shall, upon the delivery of said bonds, as aforesaid, be cut off and retained by the County Treasurer, and destroyed in the presence of this Court.

Ordered, further, that Joseph Hillegas be and is hereby appointed the agent of the County to subscribe the stock aforesaid, to aid in the construction of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, in accordance with the terms of the foregoing order, and that he cause to be prepared and signed the said coupon-bonds of the County of Henry, and that the same be delivered only in accordance with the foregoing order.

"That this order was the only one ever issued in relation to these bonds."

"That the County Court had no right to issue this order, and that the Clinton & Memphis Branch Road never had any legal existence; and if so, it was under the Act of 21st March, 1868, and that no authority to issue the bonds thereunder could exist without a vote of the people, and that it was not obtained."

"4. That the bonds were not ordered to be issued to, and were not issued to the Tebo & Neosho Railroad Company, but to a committee self-appointed to construct said branch, and the Tebo & Neosho Railroad never had anything to do with said bonds."

"5. That the bonds bear ten per cent. interest, which was not authorized by law."

"6. That after said speculators had obtained said order of 1st August, 1870, the Tebo & Neosho Company, prior to the issue of the bonds, pursuant to the Statute, sold out all its rights and franchises to the Missouri, Kansas & Texas Railroad Company, and said sale revoked the authority to issue the bonds."

"7. That certain proceedings were begun in the State Court, on 11th January, 1872, after the issue and sale of the bonds, to enjoin the collection of said tax."

"8. That of all the matters and facts and proceedings here-

inbefore pleaded, the plaintiff had notice when he became the bearer of said bonds."

The plaintiff, (see Record, page 16,) replied denying notice of all or any of the matters, allegations and facts set up in the answer, or that he is affected thereby.

UPON A TRIAL BY JURY,

The plaintiff offered the bonds and coupons in suit, and defendant offered, in evidence the orders of subscription herein set forth, set out on pages 23 and 33, of the Record, and the Record of the County Court, of 7th November, 1870, reciting that the conditions of subscriptions had been performed, and ordering the bonds to be delivered to the Chairman of the Committee of the Branch Road.

On the seventh (7th) day of November, 1870, the said Court made and had entered of record the following order for the issue of the bonds contemplated in said orders, to-wit, (Jennings and Hillegas present, Stephenson not sitting,) see Record, p. 33:

"In the matter of the subsription of Henry County to the Capital stock of the Clinton & Memphis Branch of the Tebo & Neosho Railroad Company.

"Whereas the County Court of said County, at the August term, 1870, of said Court, made an order in behalf of said County agreeing to take one thousand five hundred shares of the denomination of one hundred dollars each, and amounting in the aggregate to one hundred and fifty thousand dollars, of the capital stock of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, under and by virtue of the authority in said order recited ; and whereas Joseph Hillegas was appointed by said Court in said order the agent of said County to subscribe the stock aforesaid; and whereas said Hillegas, as said agent, in pursuance of said order, did subscribe for and take, in behalf of said County, the one thousand five hundred shares of the capital stock of said Branch Railway Company aforesaid ; whereas said capital stock by said was made payable by the issue and delivery to the committee appointed to construct said Branch Railroad, of the coupon bonds of the County of Henry, of the denomination of one thousand dollars each,

to bear date January 1st, 1871, with interest at the rate of ten per centum per annum, payable semi-annually at the National Park Bank, in the City of New York, principal to be paid at the expiration of ten years after the date thereof; and whereas said Branch Railroad has on its part complied with all the conditions precedent to the delivery of said bonds as set forth in said order:

"Now, therefore, it is considered by the Court that said bonds be signed by the presiding Justice of this Court and attested by the Clerk of this Court, under the seal thereof, and the coupons signed by said Clerk as directed in said order, and that said bonds, numbered from No. 1 to No. 150, inclusive, of the denomination of one thousand dollars each, and amounting in the aggregate to one hundred and fifty thousand dollars, signed and sealed as aforesaid, be delivered to the chairman of the committee of construction of said Branch Railroad, and that the Clerk of this Court take his receipt therefor."

The defendants also offered in evidence the testimony of the following witnesses and records:

John N. Barlow testified, in substance, (see Record, pp. 18, 19, and 20,) that he was Deputy County Clerk of Henry county; that he held the office of County Clerk thereof from July, 1865, to January, 1871, and had been continuously in said office from 1865 to the present time; that the order of subscription aforesaid was made by said County Court, and is the only one made by it in respect to the issue of bonds in question; that there was no election ordered by said County Court, and no election in fact was held, to test the sense of the voters of said county touching the said subscription, as required by the 11th article of the Constitution of the State; that the bonds in question were delivered to one Mr. D. C. Stone, of Clinton, Missouri, who gave his receipt therefor; that Mr. Stone afterwards took up his receipt and gave in its place certificates of stock in the Clinton and Memphis Branch Road; that Mr. Stone was at the time acting in the capacity of President of said Branch Road and he delivered the bonds to him as such President; that Mr. Stone at this time was keeping a broker and exchange dealer's office in Clinton, Henry county, Mis-

souri; that he had no knowledge of Mr. Stone's having any connection with the Tebo & Neosho Railroad Company; that there was no certificate of stock issued by either the Tebo & Neosho Railroad Company, or the Missouri, Kansas & Texas Railway Company, to Henry County, on account of the subscription aforesaid.

Jared Stephenson testified, in substance, (see Record, pp. 20 and 21,) that he was one of the Justices of the County Court of Henry county from 1869 to the present time, and was on the bench when the order of subscription aforesaid was made; that that was the only order made in respect to the issue of bonds to the Branch Railroad aforesaid; that there was no election ordered or held to take the sense of the people to authorize said subscription, and that the Court declined to order such election because they feared the people would not vote for such subscription, and they would lose the road; that the subscription was made upon the application and at the instance of a number of persons in Clinton, among whom where A. D. La Due, Judge McBeth, William Weaver and others; that he did not know who got the bonds, and that the county got no certificate therefor of stock in either the Tebo & Neosho Railroad Company, or the Missouri, Kansas & Texas Railway Company.

R. S. Stevens testified, in substance, (see Record, pp. 21 and 22,) that he was General Manager of the Missouri, Kansas & Texas Railway Company, and held that position for over three years, and ever since the organization of the company; that the Tebo & Neosho Railroad Company was sold, with all its rights, franchises and property, and transferred to the Missouri, Kansas & Texas Railway Company, on the 11th of October, 1870, and that thereafter the property, rights and franchises of the Tebo & Neosho Railroad Company passed under the exclusive control and management of the Missouri, Kansas & Texas R'y Company; that the officers and directors of the Tebo & Neosho Railroad Company thereafter had nothing to do with, nor any control over, the road; that the Missouri, Kansas & Texas Railway Company never authorized the construction or the creation of the so-called Clinton &

Memphis Branch Road, nor had his company ever solicited, or authorized any one for it to solicit, from the County Court of Henry county, subscriptions to the capital stock of either of said companies or so-called Branch Road, or to aid in its construction; that his company never in any way accepted said subscription, nor did it ever receive any bonds issued thereunder, or other bonds from said county; that they never appointed any agent in respect to said Branch Roads; nor did any of the parties connected therewith ever report to his company any of their acts or doings in connection with said Branch Roads; that his company had never issued any certificates of stock on any subscription, to said Branch Road, nor was it under any obligation to do so.

Cyrus Newkirk testified, in substance, (see Record, page 22,) that in 1870 he was a Director in the Tebo and Neosho Railroad Company and its Treasurer; that about the month of June of that year, Peter A. La Due and other citizens of Clinton, Missouri, desiring to forward the project of a railroad from Kansas City, Missouri, in the direction of Memphis, Tennessee, in order to avoid the necessity of obtaining the consent of two-thirds of the qualified voters of the counties through which such proposed road would pass, as required by the Constitution, sought permission of the Directory to designate the said projected road as a Branch of the Tebo & Neosho Railroad in order to claim the privileges of its charter; to which they consented, with the understanding between the parties that the company was not to be in any wise responsible for the acts or liabilities of such Branches, nor was the company to build or construct them. The Branch Roads in fact, were to be entirely independent of the company; that his company never solicited any subscription from the County Court of Henry County to aid the building of said Branch Roads, nor had they anything do to therewith; that no one connected with said Branches ever reported to the Tebo & Neosho Railroad Company, nor did the company ever accept any subscription from said county on account of said Branch Roads, nor had his company ever ratified them; that his company never issued any certificate of stock to Henry County for any subscriptions to said Branch Roads, or either of them, nor had they ever contracted so to do;

that his company was sold out and transferred to the Missouri, Kansas & Texas Railway Company on the 11th day of October, 1870; that from and after that date the company passed under the exclusive management and control of the Missouri, Kansas & Texas Railway Company, and thereafter the officers and directors of his company ceased to have anything to do therewith; that he had known Mr. Stone, of Clinton, Henry county, Missouri, for four or five years; that he was never connected with the Tebo & Neosho Railroad Company, nor was he ever employed to solicit or obtain any subscription from counties for his company; that no bond or bonds issued by Henry County for the use or benefit of the Clinton and Memphis, or the Clinton & Kansas City Branch, was ever received by said company.

The defendant below also put in evidence, as a part of the record of the Henry County Court, the following, appended to the order of subscription heretofore mentioned, to-wit:

"Jared Stephenson (one of the Justices of the County Court,) dissenting, protests against the above order of the Court, for the following reasons:

1. The Court is prohibited by the 17th section of chapter 63 of the General Statutes of Missouri, from takiug the stock it subscribed, or to loan its credit to, said proposed railroad, without having first ordered an election, at wich two-thirds of the qualified voters of Henry County should give their assent to such subscription; there having been no such election, the said subscription is illegal and void.

2d. Because there is no legal corporation organized under any law of this State by the name of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, nor any lawfully authorized corporation by the name of Clinton & Kansas City Branch of the Tebo & Neosho Railroad.

3d, Because the County Court has no right to do indirectly what she is prohibited from doing directly by the statutes before cited, namely: To vote money and aid to a railroad organized since the adoption of the New Constitution of Missouri, without the preliminary steps of an election, at which two-

thirds of the qualified voters of the county should vote in favor of the subscriptions.

4th. Because, by the order of the County Court of last Term, the subscription was agreed to be voted by a majority of this Court upon a petition of a majority of the taxpayers of Henry county, and there has been no legal or sufficient evidence produced to the Court that said majority have so petitioned.

5th. Because, in view of the burdensome taxation already imposed upon the citizens of Henry county, I consider this new tax ruinous in its tendencies, and inexpedient at this time."

The defendant also put in evidence the order of subscription aforesaid. Also the deed of sale from the Tebo & Neosho railroad company to the Missouri, Kansas & Texas Railway Company, of date the 19th day of October, 1870, executed in pursuance of resolutions adopted by the former company October 11th, 1870, authorizing the sale. The substantial part of said deed is as follows:

"This indenture, made the 11th of October, in the year of our lord one thousand eight hundred and seventy, between the Tebo & Neosho Railroad Company, a corporation organized under the laws of the State of Missouri, party of the first part, and the Memphis, Kansas and Texas Railway Company, a corporation organized under the laws of the State of Kansas, party of the second part, witnesseth, that in consideration of the sum of one dollar, paid to the said party of the first part, by the said party of the second part, the receipt of which is hereby acknowledged, and of the benefits and advantages them thereunto moving, and in accordance with a resolution of the stockholders of the party of the first part, passed on the 11th day of October, A. D. 1870, and the consent, in writing, of a majority in interest of the stockholders of the party of the first part, the said parties of the first and second parts have reciprocally covenanted and agreed, to and with each other, as follows:

The party of the first part doth hereby sell, convey and transfer to the said party of the second part, all its privileges,

rights, powers, franchises, real estate and other property, the whole or a part of which is in this State, excepting only such as belong to the extension of the Tebo & Neosho line north of Sedalia *via* Boonville, Fayette and Moberly to the railroad bridge at West Quincy, declared July 2d, 1869, certificate of which, dated July 3d, 1869, was filed in the office of Secretary of State, and doth consent to a merger of the same, with the franchises, property and rights of the said party of the second part; and the said Missouri, Kansas & Texas Railroad Company, party of the second part, shall have, exercise and enjoy, all the rights, powers, privileges and immunities of the original charter of the Tebo & Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as has been heretofore exercised and enjoyed by the said party of the first part, or by the several shareholders in said company, whose stock shall be exchanged as herein provided, either or both; and the said party of the second part does hereby accept the terms and conditions of the within instrument."

Which deed was duly filed and recorded in the office of the Secretary of State.

Defendant, below, then put in evidence the proceedings and judgment in the action for injunction, at the relation of William N. Pickerall, Circuit Attorney, etc., against the Justices of the County Court of Henry county *et al*, as shown from page 30 to 43 of the printed record.

The defendant, below, then read in evidence the deposition of Foster P. Wright, of Clinton, Henry county, Missouri, who testified, in substance, that about the 1st of February, 1871, he received a letter at Sedalia, Missouri, from D. C. Stone, of Clinton, Missouri, requesting him to come to Clinton for the purpose of giving an opinion in regard to the validity of certain bonds issued by the counties of Henry and St. Clair, in aid of the Clinton and Memphis Branch of the Tebo & Neosho Railroad; that at that time he was an attorney at law, practicing

at Sedalia, Missouri; that he went to Clinton, and Mr. Stone handed him a letter from the plaintiff, Mr. Nicolay, of New York, requesting his opinion in regard to the validity of those bonds; that the letter was mislaid; that he prepared an opinion accordingly, marked exhibit "A," and handed it to Mr. Stone to mail to Mr. Nicolay; and Mr. Stone paid him one hundred dollars therefor; that he examined the proceedings and records in respect to said subscription, preliminary to the preparation of said opinion; that his opinion was asked principally as to the validity of said subscription in view of the New Constitution, there having been no election by the people authorizing such subscription; that he gave his chief attention to that.

The opinion thus furnished by Judge Wright to Mr. Nicolay, was also put in evidence, presenting the discussion of the validity of the subscription and bonds in question, under the charter of the Tebo & Neosho Railroad Company, and the act of the Legislature of the State of Missouri, entitled, "An Act to aid in the Building of Branch Railroads in the State of Missouri," approved March 21st, 1868, and the 14th Section of the 11th Article of the Constitution of Missouri, requiring a two-thirds vote of the qualified voters of the county to authorize the County Court to make such subscription; the opinion conveying to Mr. Nicolay the information that no such election was had authorizing the subscription in question: See pages 3, 4, 5, 6, 7 and 8, 44 and 45 of the Record.

The defendant then introduced as a witness, Harvey W. Salmon, Treasurer of the State of Missouri, who testified, in substance, that in 1871, he lived at Clinton, Missouri, and was a member of the firm of Salmon & Stone, Brokers and Bankers at that place—the said Stone being the D. C. Stone who was then President of the Clinton & Memphis and Clinton & Kansas City Branch of the Tebo & Neosho Railroad Company; that about the 20th of January, 1871, he went to New York City to negotiate, for said Branch Railroads, the bonds in question, which were held by said Stone; that he met in New York the plaintiff, who was a broker, who proposed to negotiate said

bonds for him; that he showed to the plaintiff the orders of the County Court of Henry county aforesaid, and of St. Clair county, making the subscription to said Branch Road; the plaintiff examined them, and said before he would deal with the bonds he wanted a lawyer to investigate the regularity of the issue of the bonds by said counties; that plaintiff told him he had solicited Judge F. P. Wright, of Sedalia, Missouri, to do this for him; that he afterwards saw, in plaintiff's office, the manuscript of said Wright's opinion to him, and that plaintiff had the opinion printed; that the paper marked exhibit "A," with the deposition of said Wright herein, is the opinion alluded to; that at said time the plaintiff had not bought any of said bonds; that he afterwards sold plaintiff one hundred and seventy-one thousand dollars of said bonds at 82½ cents; he supposed that Mr. Stone paid Judge Wright for his opinion out of the proceeds of the bonds. In August, 1871, he made the contract with plaintiff for the sale of the balance of the bonds. He sold him some prior to August, 1871. The plaintiff was to take 30 of them per month. The last were delivered to him in May, 1872. *Witness stated that the protest of Judge Stephenson was not in the transcript of the Henry County Record exhibited by him to Nicolay.*

The plaintiff demurred to this evidence; the Court sustained the demurrer, and the jury rendered a verdict for the plaintiff. The evidence is all embodied or referred to and identified in the Bill of Exceptions.

ARGUMENT.

The plaintiff in error assigns seven causes of error, and argues four—

First. That the subscription by the county was not made to the stock of the Tebo & Neosho Railroad, but to the "Clinton & Memphis Branch," miscalled in the assignment of error, "Clinton & Kansas City Branch" of the Tebo & Neosho Railroad Company, and that the corporation had no right to issue stock in its branches — separate from the other stock of the corporation.

Before we proceed to argue the law, under which the bonds were issued, we desire the Court to look into the exact facts, which are said to charge the plaintiff with notice; for in relation to all these defences set up in the answer of which there is no proof of notice to the plaintiff. This Court holding as it has repeatedly held, will say that they are not material, and though proved, effect nothing against plaintiff. The only two witnesses who testify as to any notice to the plaintiff, are Salmon, the immediate vendor of the bonds to the plaintiff, and Judge Wright, who gave the plaintiff an opinion as to their validity; their evidence is set out in full in the Bill of Exceptions, Record pages 43, 44 and 45.

Salmon says he was a member of Stone's firm, who was the President of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, and about 20th January, 1871, went to New York to meet the plaintiff, Nicolay, who was a broker, and proposed to sell the bonds for him. That he showed Nicolay the orders of Henry and St. Clair County Courts, (to be found on pages 23 and 33 of the Record); the first the order to issue, and the second reciting that the conditions of the order of the subscription had been complied with; that the subscription had been made to the stock of the Clinton & Memphis Branch of the Tebo & Neosho Railroad, and ordered that the bonds be delivered over to the Chairman of the Committee for the construction of said Branch Railroad. That the plaintiff examined the orders, and said before he would deal in them that he must have the opinion of a lawyer to investigate the regularity of the issue of bonds by said counties. That he had solicited Judge F. P. Wright's opinion, and the witness saw his manuscript opinion in Nicolay's office. (See papers marked "Exhibit A and B," filed with Wright's deposition.) These papers are in the Record, pages 3, 4 and 5, misplaced in order, but by requirement part of the bill of exceptions. This witness says that the protest of Judge Stephenson was not on the County Record, which the plaintiff saw.

The clerk, Snyder, who made the transcript, in his evidence, Record page 23, says he did not copy Stephenson's protest.

Judge Wright testifies, Record page 44, that about 1st Feb-

ruary, 1871, Stone requested him to come to Clinton for the purpose of giving his opinion as to the validity of certain bonds of Henry and St. Clair counties. That Stone handed him a letter from Nicolay requesting his opinion of the validity of these bonds, and his letter, "Exhibit A," Record, pages 3, 4 and 5, is a copy of the opinion he forwarded Nicolay, and "Exhibit B," Record pages 5, 6, 7, 8 and 9, a copy of a letter he forwarded Martin, the President of the Tebo & Neosho Company. That for the purpose of obtaining information, he went to the office of A. LaDue, the attorney of the company, and he had there what purported to be copies of the books of the company, and copies of the orders of subscription made by counties subscribing said stock, and he had access to these papers.

Wright supposed the main thing was to ascertain the validity of the subscription in view of the new Constitution, and gave his chief attention to that. That he did not know the plaintiff. *Was paid for the opinion by Stone* (see Record, page 45). The letter of Nicolay was handed to him after it had been opened.

Then all the notice which Nicolay had, was a copy of the orders of the County Courts of Henry and St. Clair, ordering the subscription and issue of bonds, after the terms were complied with, and the opinion of Judge Wright that bonds issued under such orders were valid under the Constitution of Missouri.

Whether any stock was ever issued on the main line or branches is not in the defence and not material; whether speculators were scheming to cheat the public under the law; whether the franchise of the road was sold or consolidated and the company had ceased to exist; whether State Court proceedings were begun to prevent levy of a tax and every other defence set up is immaterial, and not to be taken into consideration.

The sole question is, were these bonds valid either under the original charter of the company, or the act of 21st March, 1868, as to branch roads? The bonds recite that they are issued to "the Tebo & Neosho Railroad Company" to the use and in the name of "Clinton & Memphis Branch of the Tebo & Neosho

Railroad Company, and to aid in building said Branch Road."

The original charter of the company (see Missouri Acts of 1859–60, page 402, Section 1,) authorized a capital of five millions, to be divided into hundred dollar shares. "They were authorized to make contracts, to purchase and sell real estate, to make by-laws, rules and regulations proper for carrying into effect the provisions of their charter, not repugnant to the Constitution of the United States or the State, and that they should have the usual and necessary powers of a corporation for such purposes.

"§ 4. The Directors may do all such acts as will be calculated to promote the prosperity and usefulness of the company.

"§ 6. Said company shall have full power to mark, survey, construct, maintain and operate a railroad from a point in Pettes County, through Henry County, to a point on the State line in Jasper and McDonald Counties, etc., * * * *and may extend Branch railroads into and through any counties, that the Directors may deem advisable.*"

The main line was only one hundred miles long, and branches might be built indefinitely through any Counties in the State.

"§ 7. When one hundred and fifty shares were subscribed, and five per cent. paid in, the company could begin business.

"§ 8. Sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, of the Act, entitled 'An Act to incorporate the Osage Valley & Southern Kansas Railroad Company,' approved 21st Nov., 1857, were re-enacted and all the powers therein contained conferred on the Tebo & Neosho Railroad Company."

This Act of 21st Nov., 1857, will be found in Session Laws of 1857, page 59.

Section 14 of said act, page 62, Session Laws, prescribed that, "It shall be lawful for the County Court of any County in which any part of the route of said railroad or branches may be, or any County adjacent thereto, to subscribe to the stock of the company, or invest its three per cent. fund, or other internal improvement fund belonging to the County, in stock

in said road, and for such stock subscribed in behalf of the County, may issue bonds of the County to raise funds to pay for the same, and to take proper steps to protect the interest and credit of the County Court; may appoint an agent to represent the County vote for it, and receive its dividends.

"§ 15. Said company shall have power to extend construct, maintain and operate said railroad or branches, beyond the limits of this State, and are hereby authorized to make contracts for the same."

The question of law under this charter is not whether the County could elect to take stock in a branch of the corporation. It is not an action to enforce a subscription under the charter of the company, but whether the County has power to issue its bonds to the corporation, to aid in building a branch of its road. This is no suit upon a contract of subscription. It is no suit in relation to the validity of a subscription to the main line or branch, but whether a bond issued to an innocent holder for value shall be paid. Suppose the county officers assented to a by-law by which their stock would be protected in a branch, more valuable than the main line; to take stock whose dividends should be limited to the branch. Would that make their bond void?

But it is objected, that the recital of the bond, that it is issued to the Tebo & Neosho Railroad for the use and to aid in building the branch, renders the bond invalid. Why? Did not the County have authority under the charter to issue its bonds after the main line was completed, to aid in building a branch and to require the proceeds of the bond to be expended therein, and does that render the bond void, under the Act of 1857?

This Court has so often and so repeatedly held that it is the duty of a purchaser to know that the law authorized the bonds to be issued, and that it is not his duty to see that the details of the law are complied with; that that is the duty of the officers intrusted with the execution of the law to see that it is executed. The grant of power is all that a purchaser need look to.

The counsel say that the bonds do not follow the order of subscription, and that the Clerk and Chairman had no right to issue them.

On both points the Record contradicts the counsel:

There are two orders of the County Court; one in Record pages 23 and 24, of 4th August, 1870, after reciting the advantages to the County by the building of the branch road, orders a subscription of one thousand five hundred shares in the Clinton & Memphis Branch of the Tebo & Neosho Railroad, under and by virtue of the authority contained in the charter of the Tebo & Neosho Railroad Co., and under the Act of 21st March, 1868, in relation to Branch Roads.

The charter of the Tebo & Neosho R. R. Co. authorized the building of the branch, and the issue of the bonds to build the same.

The order authorized Joseph Hilligas to make the subscriptions, and that he caused to be prepared and signed the bonds of the County, and that the same should be delivered in accordance with the order, which requred a particular location of the branch, the proceeds of the bonds to be expended in Henry County; that the contract should be let to responsible parties to be approved by the Court, and that all interest coupons maturing before letting of the contract, should be cut off.

On the 1st of November, 1870, in the order of the Court, (Record, page 33,) recited that all these conditions precedent had been performed, and that said bonds be delivered to the chairman of the committee for the construction of said branch road.

There was ample power in the original charter to do everything which was done in relation to this branch road, under the original charter.

There was authority to build the branch road in the charter of 1860, Sec. 6.

There was ample power in the 14th Section of Act of 1857, incorporated into Act of 1860, for the County Court to issue its bonds to aid in building this branch. There was ample power

in the original charter, Secs. 1 and 6, to pass by-laws and regulations to protect the County and other shareholders in the branch in the profits arising from that transaction, as provided in Secs. 1, 2, 3, of the branch aid Act of 21st of March, 1868. There was ample power in the corporation of the Tebo & Neosho Co., Secs. 1 and 6, to provide that the holders of stock in the Tebo & Neosho Railroad Company, subscribed in aid of the Clinton & Memphis Branch, should have the same rights as other stockholders of the company ; but in all matters affecting the branch such stockholders should control it, and the Board of Directors should be governed by their instructions in relation thereto.

So that so far from the issue of these bonds, or the subscription to the stock of the company to aid in building the branch road being void, both the bonds and the subscription to the stock were fully authorized by the original charter, and Nicolay was fully authorized, as a prudent man, to buy them as valid, without looking to the Act of 1868.

Second ground of error: that these bonds are void, being issued under the Act of 21st of March, 1868, without a vote of the people, and therfore the bonds are null and void, for want of legislative authority, under the Constitution of Missouri, enacted in 1865.

This Act of 21st of March, 1865, has been declared valid, by the Supreme Court of Missouri, as also by Dillon, Circuit Judge, in the case of Nicolay vs. St. Clair County, in bonds to the same branch of the same road, which are referred to, in this record, in his opinion, in 3 Dillon, 163–168:

" After the adoption of the Constitution of 1868, the question as to the effect of the 14th Section of the 11th Article, upon these special charters, came before the Supreme Court of the State, for its judgment. That Court held that the power conferred in these special charters upon the County Courts to subscribe without a vote of the people, were not repealed or touched by the prohibition of the Constitution, its view being that the Constitution did not affect existing charters, but only limited the power of the Legislature. This point was first decided in the

Macon County case (State *ex rel.*, etc., vs. Macon County Court, 41 Missouri, 453, 1867,) and this is the settled law of the State.

The Chillicothe, etc., vs. The Mayor and council of the City of Brunswick, 44 Missouri, 553, 1869.

Kansas City, etc., vs. Aldemer, 47 Missouri, 349, 1871.

State, etc., vs. Sullivan County Court, 51 Missouri, 522, 1873.

Smith *et al.*, vs. Clark County, 54 Missouri, 58, 1874, and not there cited:

State vs. Green County Court, 54 Missouri, 540, 1874.

"In this last case, Smith vs. Clark County Court, the legislative and judicial decisions of the State on the subject of municipal aid to railways, is reviewed by the able Judge, who delivered the opinion of the Court, in which, speaking of this subject, he says, 'so that the provision of the revised Code of 1855, and the Amendatory Acts of 1860 and 1861, and the Constitutional prohibition and the legislative adoption of that prohibition immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the Court or any individual Judge thereof, so far as the reports show, not to effect the repeal of the privilege contained in special charters.'"

In the case of State vs. Green County Court, 54 Missouri, 540, the Supreme Court of Missouri have settled a case precisely similar to the one at bar, and the Circuit Court followed that case in deciding this. In that case as in this, the power to build branches was granted to the original company. (See the section cited in the decision, 54 Mo., page 548.)

The Court held:

1. A provision in the charter of a railroad company, authorizing County Courts to subscribe stock to such railroads without a vote of the people, is not repealed by subsequent general laws, nor by the subsequent adoption of the present Constitution, (Smith vs. Clark County, 54 Mo., page 58.)

2. The power conceded to Counties or other municipal bodies by a railroad charter to take and subscribe stock in such railroad, was intended as a privilege to the railroad.

3. When several railroads consolidate, the new road shall stand in their place, and possess the rights, power and privi-

leges they had severally enjoyed in the portions of the road which had previously belonged to them.

4. The action of the directors of the Kansas City & Cameron Railroad, formerly Kansas City, Galveston & Lake Superior Railroad, in determining to build a branch road, in accordance with the Act of March 21st, 1868, and the charter of the Kansas City, Galveston & Lake Superior Railroad, and the Acts amendatory thereto, followed by the partial building thereof, and followed by their own consolidation with the Hannibal & St. Joseph Railroad, did not deprive such branch road of the privilege of subscription from the County Courts of the counties along the line of the road, without the prior vote of the people therein, such privileges being contained in the charter, and under the Act of March 21st, 1868, though nominally a branch, was in reality a distinct and separate road from the Hannibal and St. Joseph Railroad."

This decision of the Supreme Court of Missouri settles conclusively, both the authority to issue these bonds to aid in building this branch, under the original charter, as well as the Act of March 21st, 1868, as the continuance of this power after the consolidation set up, in the third error assigned, in favor of the defendant in error.

The Act of March 21st, 1868, is vehemently assailed by the counsel for the plaintiff in error, though it has been sustained by the Supreme Court of Missouri, and they even ask this Court to overrule the decision of the Missouri Supreme Court, interpreting their own Constitution.

Perhaps any words of ours commendatory of that Act are out of place, but we may be excused for adding, that the power given to the Tebo & Neosho Road to build branches and receive in aid subscriptions of Counties, to be paid for in bonds, is not diminished or taken away, or the right of legislature to amend that and like charters is not abridged by the new Constitution of Missouri. That, by its words and its judicial interpretation, relates to future incorporations.

The power of amending the Tebo & Neosho charter was complete and perfect in the legislature.

The General Assembly having complete power to amend the old charter in any and every respect, which did not impair the obligation of contracts; it is hardly proper to propose to this Court: Was the amendment, as to the power to build branches, by the act of 21st March, 1868, a wise one?

If, in this tribunal the inquiry was proper, we should insist that every provision of the Act of March 21st, was wise and prudent, and calculated to protect and foster the power to build branch roads.

The holders of branch stock were not only to be stockholders in the corporation generally, and to exercise governing power and derive benefits therefrom, but to have the exclusive benefit of all the profits arising from building the branches in which their money was placed. The branch was to be exempt from debts or liens, or liabilities of the main line, and was to have control of the government thereof; and the law, against which such vehement assaults are made, was giving to the stockholders benefits, rights and advantages which they did not possess under the charter.

Third ground of error: that the sale of the Tebo & Neosho road prevented the performance of the subscription prior to the sale.

This question is settled in favor of the defendant in error, in the Greene county case. The sale and consolidation changed no right and altered no duty.

"The plaintiff in this suit was not bound to take notice of the consolidation and sale, and if he had known it, it would not have affected his rights, as the same power existed in the consolidated as the original company."

Fourth ground of error: that the judgment should be overruled because the declaration did not aver that the bonds were issued under a particular statute; this objection, if it were a good one, comes too late. The plaintiff in error should have demurred to the petition, if he thought, it did not set forth a cause of action. It is true, that Judges Miller and Dillon both intimate, that the declaration on the bond of a municipal corporation should show

the law under which it is issued; but they do not say, that such a declaration is bad, if it does not, and they would not have announced a correct principle of pleading, if they had said so.

The Circuit Courts, sitting in a State, take the same notice of the State laws, when applicable to cases in their court, as the State courts do: The Court takes notice of the laws in relation to municipal corporations without their being pleaded, and when a declaration sets out a bond given by the County Court of Henry County, given to the Tebo & Neosho Railroad Company, to the use of the Clinton & Memphis Branch of the said company. The Court will take notice of the law, under which said bond was issued and when the declaration also sets out, that the bond itself is filed and profert is made of the bond, if the defendant wishes to look into the recital of the bond, he prays oyer of it, and then he can answer or demur to the declaration as he thinks fit.

But in this case the defendant has waived his right to demur if he had it, and by his answer admitted the execution of the bond, the consideration and law under which it is claimed to have been issued, and thus he has waived his supposed objection to the declaration.

J. & W. M. GRANT,
for Defendants in Error.

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.. be amended, etc."